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DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

LORD ELDON *v.* HEDLEY BROTHERS.

[1933. E. 851.]

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Sale of Goods—Contract for Tenancy of Farm—Agreement by Tenant not to dispose of hay grown on farm—Statutory limitation to last year of tenancy—Sale by Tenant of stacks of hay in last year of tenancy—Distress for Rent—Subsequent Removal by Purchaser of hay—Claim by Landlord against Purchaser—Pound-breach—Damages for removal of hay—Time when property in hay passed—Sale of Distress Act, 1689 (2 *W. & M., sess.* 1, *c.* 5), *s.* 3*—Sale of Farming Stock Act,* 1816 (56 *Geo.* 3, *c.* 50), *s.* 11*—Agricultural Holdings Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 30*—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 16, 17, 18.

By the Sale of Farming Stock Act, 1816, s. 11: "No . . . . purchaser of the goods, chattels, stock, or crop of any person or persons engaged or employed in husbandry on any lands let to farm, shall take, use, or dispose of any hay, straw . . . . in any other manner and for any other purpose than such . . . . other person so employed in husbandry ought to have taken, used, or disposed of the same, if no . . . . such . . . . sale [had been] made."

By the Agricultural Holdings Act, 1923, s. 30, sub-s. 1: "Notwithstanding . . . . the provisions of any contract of tenancy or agreement respecting . . . . the disposal of crops, a tenant of a holding shall have full right . . . . to dispose of the produce of the holding without incurring any penalty, forfeiture, or liability:

"Provided that he shall previously have made . . . . adequate provision to protect the holding from injury . . . . in the return to the holding of the full equivalent manurial value to the holding of all crops sold off or removed from the holding in contravention of the . . . . contract, or agreement.

"This subsection shall not apply—(*a*) in the case of a tenancy from year to year, as respects the year before the tenant quits the holding. . . . ."

L., the tenant from year to year of a farm in the county of Durham belonging to Lord Eldon, agreed by his tenancy agreement not to dispose of any hay, etc., that was grown or brought on the farm, but to consume such hay, etc., by stock on the farm and in the proper manner. In May, July and October, 1932, L. entered into three contracts for the sale to H., a firm of hay dealers, of eight stacks of hay standing on the farm. The contracts provided for the sale of the hay at various prices per ton "put free on rails. . . . . Cutting and tieing to be done by Hedley Bros. Delivery of same to be taken when convenient, and only good marketable hay clear of mould to be delivered in a dry condition." H. paid L. at the time of entering into the contracts the estimated value of the stacks of hay. At the time L. entered into these contracts he was still the tenant of the farm and could not in the ordinary course determine his tenancy before May 13, 1934. In October, 1932, however, L. asked to be allowed to terminate his tenancy on May 13, 1933, and on November 18, 1932, the landlord's agent agreed that the tenancy should terminate on May 13, 1933. In January, 1933, the landlord's agent informed H. that L.'s tenancy agreement would terminate on May 13, 1933, and that the hay would not be allowed to be removed from the farm. On February 13, 1933, the landlord levied a distress upon the farm for arrears of rent. The bailiff found that H. were in process of cutting into the eight stacks of hay and taking the hay away, and notwithstanding the presence of the bailiff they removed all the hay in the eight stacks. On February 14, 1933, H. served upon the landlord a declaration under s. 1 of the Law of Distress Amendment Act, 1908, that the tenant had no right of property or beneficial interest in the goods distrained. The landlord, thereupon, brought an action against H. alleging that their acts amounted to pound-breach and claiming treble damages therefor; in the alternative

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the landlord claimed 102*l.* damages for the removal of the hay contrary to s. 11 of the Sale of Farming Stock Act, 1816. At the trial it was proved that it was a common practice in the hay market for dealers to buy hay in stacks, sometimes for a lump sum, and sometimes for a price per ton, and that purchases of stacks, even though weight and price necessarily remained to be determined at the time of delivery, were regarded by all persons interested in the market as passing the property in the stacks to the buyers at the time of the bargain:—

Held, first, that taking into consideration the terms of the contracts, the conduct of the parties and the circumstances of the case, the intention of the parties was that the property in the hay should pass to the buyers at the time when the contracts were made; and that the term of the contracts entitling the buyers to refuse to take delivery of, or to pay for, mouldy or unmarketable hay did not prevent the property in the hay from so passing, and that therefore the landlord was not entitled to recover treble damages for pound-breach.

Secondly, that s. 11 of the Sale of Farming Stock Act, 1816, had not been impliedly repealed by the Agricultural Holdings Act, 1923; that L. was not freed from his obligation under his tenancy agreement not to dispose of any hay grown on the farm but to consume it by stock on the farm by s. 30, sub-s. 1, of the Act of 1923, as there was no evidence that he had made adequate provision to return to the holding the full equivalent manurial value to the holding of crops sold off or removed from the holding, and further the hay had been removed from the farm in the year before L. quitted the holding. He ought, therefore, not to have disposed of the hay otherwise than as provided for in his tenancy agreement. The purchasers of the hay stood in L.'s shoes and had therefore committed a breach of the Act of 1816, and the landlords were therefore entitled to damages for the removal of the hay.

APPEAL from a decision of H. H. Joy, Esq., K.C., Commissioner of Assize.

By an agreement in writing dated May 17, 1926, between the Earl of Eldon and John Suthren Lockey, a certain farm known as Elstob Hall Farm in the county of Durham was let by the Earl of Eldon to Lockey from May 13, 1926, as tenant from year to year at a yearly rent of 194*l.* payable quarterly.

By clause 25 of the agreement the tenant agreed " not to dispose of any hay, straw or crops of any description that may have been or may be grown on or brought on to the farm . . . ., but to consume such hay, straw and crops by stock on the farm in a proper manner. . . . . Also not to

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dispose of any manure or compost which shall have been or shall be made on or brought on to the farm but to spread the same annually upon the lands most proper for receiving the same, except any made during the last six months of the tenancy, which shall be left on the farm at the expiration or sooner determination of the tenancy together with all unconverted hay and straw for the use of the landlord."

The tenant entered into possession of the farm and occupied it upon the terms of the agreement.

On May 19, 1932, the tenant agreed to sell to Messrs. Hedley Brothers, a firm of hay dealers in a large way of business in the North of England, two stacks of old land hay. The contract note was in the following terms:—

> "Sold by J. Lockey, Elstob Hill of Great Stainton, Stockton, to Hedley Bros. Tyne Crushing Mills 28 & 32, Side, Newcastle-on-Tyne, two stacks of old land hay standing at his farm. Price twenty two shillings and sixpence per ton. Put free on rails at Elstob Station. Cutting and tieing to be done by Hedley Bros. Delivery of same to be taken when convenient, and only good marketable hay, clear of mould, to be delivered in a dry condition. Any dispute arising therefrom to be settled by arbitration. The seller agrees to keep hay insured until delivery is taken. Insured against fire with
>
> Received the sum of twenty five pounds in part payment of same."

"Hedley Bros. to take no mouldy hay."

In June, 1932, the tenant was in arrears with the rent of the farm, and the landlord by a memorandum endorsed upon the tenancy agreement in consideration of the arrears being paid by certain instalments made an allowance by way of deduction in the rent of 20*l.* a year for three years from November 11, 1931. It was a term of the memorandum that if any instalment of arrears of rent was not paid within twenty-one days of the day when it became due the whole of the arrears was to become payable forthwith and was to be treated as part of the current year's rent.

On July 26, 1932, the tenant agreed by a contract note in writing to sell to Hedley Brothers one stack of best new hay (with part of white hay in) and one stack of new second year's hay at a price of 35*s.* per ton upon terms similar to those in the contract note of May 19, except that Messrs. Hedley Brothers were to receive 1*l.* out of the deal and "discoloured hay on top of stacks to be retained by farmer." The tenant acknowledged to have received 30*l.* in part payment of same.

On October 27, 1932, by a contract note in writing the tenant agreed to sell to Messrs. Hedley Brothers one stack of best hay at 35*s.* per ton, and three stacks of meadow hay at 20*s.* per ton upon terms similar to those of the contract note of May 19, except that the tenant agreed "to return to Hedley Bros. 2*l.* at finish" (meaning the completion of the delivery of the hay).

All the stacks of hay were left standing and untouched on Elstob Farm until they were removed by Messrs. Hedley Brothers in February, 1933.

At the time Lockey entered into the contracts for the sale of the hay to Hedley Brothers he was still the tenant of the farm and could not in the ordinary course determine his tenancy before May 13, 1934. On October 26, 1932, however, Lockey asked the landlord's agent, Mr. R. H. Scrope, to be allowed to terminate his tenancy on May 13, 1933. Mr. Scrope replied on the same day that if he could find a suitable tenant for the farm within the next few weeks he would recommend Lord Eldon to let him go out next May. If a suitable tenant was not forthcoming he could not recommend Lord Eldon to let the tenant terminate his tenancy before May 13, 1934, which would be the date the tenant could go out if he sent in his notice to quit before next May 13.

On November 18, 1932, Mr. Scrope wrote to Lockey that he had been able to let the farm on May 13 next and he would therefore be able to agree to Lockey's request to terminate his tenancy on that day. Lockey, in fact, quitted the farm lands on March 9, 1933, but retained possession of the farm-house till May 13, 1933.

On January 17, 1933, the landlord's agent, having heard of the contracts for the sale of the hay, gave notice to

Hedley Brothers that the tenancy agreement would terminate in May, 1933, and that the sale of hay would only be recognized on condition that the hay purchased under the three contracts should be consumed on the holding, and that in no circumstances would any of the hay be allowed to be removed.

On February 13, 1933, the landlord levied a distress upon the farm for 161*l.* 4*s.* 8*d.* rent then due and in arrear, and the bailiff took possession and impounded the hay standing upon the farm. The bailiff, on going on to the farm, found that the defendants, Hedley Brothers, were in the process of cutting into the stacks of hay in respect of which the contracts were made, and taking them away. A certain portion of the hay had already been removed, and notwithstanding the presence of the bailiff the defendants removed all the hay in the eight stacks mentioned in the contracts. On February 14, 1933, the defendants served upon the landlord a declaration in writing as prescribed by s. 1 of the Law of Distress Amendment Act, 1908, that the tenant had no right of property or beneficial interest in the goods distrained.

The landlord then brought an action against the defendants, Hedley Brothers, alleging that their acts amounted to pound-breach and claiming 191*l.* 17*s.* 3*d.* as treble damages by virtue of s. 3 of the Sale of Distress Act, 1689, in respect of that cause of action; in the alternative the landlord claimed 102*l.* as damages for the removal of the hay, contrary to the provisions of s. 11 of the Sale of Farming Stock Act, 1816. (1)

At the trial it was proved that it was a very common practice in the hay market for dealers to buy hay in stacks, sometimes for a lump sum for the stack as it stood, sometimes for a price per ton, which of necessity could not be ascertained until the time for delivery arrived, and that purchases of stacks, even though weight and price necessarily remained to be determined at the time of delivery, were regarded by all persons interested in the market as passing the property in the stacks at the time of the bargain. It was also proved that the defendants, who were in a very large way of business as hay dealers, were accustomed to buy a large percentage of the hay they wanted for their business in the form of stacks and to pay for them at or about the time of bargain as much as from 90 to 100 per cent. at an agreed price per ton for the estimated tonnage of the stacks so purchased. In the present case, before making the contracts for the purchase of the hay, the defendants visited the farm, selected the stacks they were prepared to buy and tested the quality of the hay by a testing rod, and they paid at the time of entering into each contract a sum of money calculated at and intended to be 100 per cent. of the price of the hay purchased.

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(1) Sale of Farming Stock Act, 1816, s. 11: "No assignee of any bankrupt, or of any insolvent debtor's estate, nor any assignee under any bill of sale, nor any purchaser of the goods, chattels, stock, or crop of any person or persons engaged or employed in husbandry on any lands let to farm, shall take, use, or dispose of any hay, straw, grass or grasses, turnips, or other roots, or any other produce of such lands, or any manure, compost, ashes, seaweed, or other dressings intended for such lands, and being thereon, in any other manner and for any other purpose than such bankrupt, insolvent debtor, or other person so employed in husbandry ought to have taken, used, or disposed of the same, if no commission of bankruptcy had issued, or no such assignment or assignments had been executed, or sale made."

Counsel on both sides agreed at the trial that if the defendants should be held to be liable for damages for breach of the Sale of Farming Stock Act, 1816, the damages should be 102*l.*

The Commissioner of Assize held that the sales were of specific, and not of unascertained, goods, and that therefore the case was governed by s. 17, and not by s. 16, of the Sale of Goods Act, 1893 (1), and that the provisions in the contract notes indicated an intention of the parties that the property

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(1) Sale of Goods Act, 1893, s. 16: "Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained."

Sect. 17, sub-s. 1: "Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred."

Sub-s. 2: "For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

Sect. 18: "Unless a different

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in the hay was to pass to the buyers on the making of the contracts although the stacks remained on the seller's premises. He also held that the prohibition as to purchasers in s. 11 of the Sale of Farming Stock Act, 1816, having regard to the decision in *Wilmot* v. *Rose* (1), applied to purchasers generally, and was not confined to purchasers under an execution. The operation of that section had, however, been modified by s. 30, sub-s. 1, of the Agricultural Holdings Act, 1923 (2), and a tenant was now relieved from liability under provisions in his contract prohibiting the disposal of farm produce,

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intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

"Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

"Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

"Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

. . . .

"Rule 5.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made."

(1) (1854) 3 El. & Bl. 563.

(2) Agricultural Holdings Act, 1923, s. 30, sub-s. 1: "Notwithstanding . . . . the provisions of any contract of tenancy or agreement respecting . . . . the disposal of crops, a tenant of a holding shall have full right . . . . to dispose of the produce of the holding without incurring any penalty, forfeiture, or liability:

"Provided that he shall previously have made, or, as soon as may be, shall make, suitable and adequate provision to protect the holding from injury or deterioration, which provision shall, in the case of disposal of the produce of the holding, consist in the return to the holding of the full equivalent manurial value to the holding of all crops sold off or removed subject to certain limitations, one of which was that the subsection did not apply in the case of a tenancy from year to year as respects the year before the tenant quits the holding. In the present case at the dates when the contracts were made neither the landlord nor the tenant nor the defendants could know that the tenancy would end within the year. At the dates of the contracts the last year of the tenancy had not begun, and he did not think that the subsequent happenings between landlord and tenant, whereby the tenancy ended in May, 1933, had the effect of causing the contract dates to fall within the period of " the year before the tenant quits." He therefore held that the plaintiff's claim failed.

The plaintiff appealed.

Hon. S. O. Henn Collins K.C. and *Hanbury Aggs* for the appellant. At the dates of the contracts for the sale of the hay the subject-matter of the contracts was not ascertained and therefore by s. 16 of the Sale of Goods Act, 1893, no property in the goods sold passed to the buyers until they were ascertained. It was only a sale of the good hay out of the eight stacks. Rule 5 of s. 18 of the Act of 1893 is a corollary to s. 16, and under that rule the property in unascertained goods only passes to the buyer when goods of the description and in a deliverable state are unconditionally appropriated to the contract. Goods were not unconditionally appropriated to the contracts in the present case until the hay in the stacks had been cut and tied. The property in unascertained goods is not transferred to the buyer by merely making a contract for the sale of such goods. This was not a sale of the stacks of hay but of an unascertained amount of hay out of the stacks.

[SLESSER L.J. referred to *Wallace* v. *Breeds*. (1)]

The hay still remained the property of the tenant and was

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from the holding in contravention of the custom, contract, or agreement:

" This subsection shall not apply—(*a*) in the case of a tenancy from year to year, as respects the year before the tenant quits the holding or any period after he has given or received notice to quit which results in his quitting the holding; or (*b*) in any other case, as respects the year before the termination of the tenancy."

(1) (1811) 13 East, 522.

liable to be distrained by the landlord, and the hay dealers are liable in damages to the landlord because they have removed goods which were not their property and which had been distrained upon by the landlord. Even if it is said that the goods were ascertained the property had not passed to the buyer at the material date because the goods had to be weighed in order to ascertain the price: see *Simmons* v. *Swift.* (1) Weighing was the privilege of the seller in order to ascertain what he was entitled to receive from the purchaser.

Assuming that the appellant is wrong as regards the first point and the property in the hay passed to the purchasers at the time the contracts were made, still the purchasers are liable to the landlord for the removal of the hay they bought of the tenant under the provisions of s. 11 of the Sale of Farming Stock Act, 1816, because the tenant was prohibited by the terms of his tenancy agreement from disposing of any hay which may have been grown or brought on to the farm; he was bound to consume such hay, etc., by stock on the farm in a proper manner. It is true that s. 30 of the Agricultural Holdings Act, 1923, relieves the tenant from any liability for breach of a provision in his tenancy agreement regarding the disposal of crops. But that protection does not apply to the last year of the tenancy, and in the events which happened these contracts for the sale of the hay were made and the hay removed from the farm during the last year of the tenancy of the holding, and therefore the purchasers of the hay from the tenant are liable to the landlord in damages. It was held in *Wilmot* v. *Rose* (2) that the prohibition as to purchasers in s. 11 of the Sale of Farming Stock Act, 1816, was not confined to purchasers under an execution but was quite general and prohibited the purchaser of a tenant's crop of hay or straw on the farm from carrying it off the farm contrary to the terms of the lease. The Act of 1816 has not been repealed by the Agricultural Holdings Act of 1923. Sect. 54 of that Act expressly provides that "Except as in this Act expressed, nothing in this Act shall prejudicially affect any power, right, or remedy of a landlord . . . . vested

(1) (1826) 5 B. & C. 857.

(2) 3 El. & Bl. 563.

in or exerciseable by him by virtue of any other Act. . . . ." It was held in *Lybbe* v. *Hart* (1) that s. 11 of the Sale of Farming Stock Act, 1816, was still in force in the year 1885.

Paley Scott K.C. and *C. B. Fenwick* for the respondents. This was a sale of specific or ascertained goods—namely, particular stacks of hay. The buyers probed each stack and bought the whole of the stack and not merely some of the hay in the stack. A hay dealer must necessarily leave the stacks of hay he buys for some time on the farmer's ground. Farmers and hay dealers have always understood that the property in the stacks passed by such a sale, even where the price of the hay is so much per ton and has to be ascertained subsequently. The parties intended the property in the stacks of hay to pass, and that intention is the decisive factor in deciding whether or not the property did pass. Nothing can be more specific than a stack of hay. The stacks of hay were in a deliverable state within the meaning of s. 62 of the Sale of Goods Act, 1893, when the contracts of sale were made. The seller's obligation was merely to have the gate open and to permit delivery to be taken of the hay by the buyers. The property in the hay passed by the intention of the parties notwithstanding that the price had to be ascertained subsequently by measurement: *Martineau* v. *Kitching*. (2) The present case is governed by s. 17 of the Sale of Goods Act, 1893, and not by s. 16. The buyers took possession of the stacks when they commenced to cut and truss the hay. Rule 1 of s. 18 applies, because there were unconditional contracts for the sale of specific goods in a deliverable state, and therefore the property in the goods passed to the buyers when the contracts were made. Rule 2 of s. 18 does not apply, because the seller had nothing to do to put the goods in a deliverable state. The seller was not bound to weigh, or measure, for the purpose of ascertaining the price, and therefore r. 3 of s. 18 does not apply. It was a sale and purchase of eight stacks of hay, and the buyers decided what they should reject as being mouldy hay. In *Turley* v. *Bates* (3)

(1) (1885) 29 Ch. D. 8.
(2) (1872) L. R. 7 Q. B. 436.
(3) (1863) 2 H. & C. 200.

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it was held that the property in the whole of a heap of fireclay passed to the buyer on the completion of the bargain, that being the intention of the parties, notwithstanding that something remained to be done by the buyer—namely, to weigh the fireclay. Rule 5 of s. 18 does not apply, because that relates to a sale by description, and this was not a sale by description, but a sale of specific stacks of hay with a right in the buyers to reject mouldy hay. In *Rugg* v. *Minett* (1) it was held that the property in a number of casks of turpentine, which had been destroyed by fire, had passed to the purchaser, because the casks had been filled up and nothing remained to be done to them by the seller. The cartage of the hay by the seller to the railway took place after the delivery of the hay to the purchaser had taken place at the farm. In *Wallace* v. *Breeds* (2) the sale was of non-specific goods—namely, "50 tons of our Greenland oil ex 90 tons" and therefore that case does not apply here. In the case of a sale of specific goods the property in them, according to s. 17, is transferred to the buyer at such time as the parties intended. The evidence as to the intention of the parties in the present case is overwhelming. It is incredible that the hay dealers should have paid the vendor the value of the goods at the making of the bargain unless they had thought that the property in the hay had passed to them. The Commissioner has found as a fact that, by a custom of farmers and hay dealers, hay dealers have the right to leave hay they have bought on the farm notwithstanding that the price was paid at the time of sale.

The Sale of Farming Stock Act, 1816, although not expressly repealed by the Agricultural Holdings Act, 1923, must nevertheless be taken to have been impliedly repealed by that Act. The Act of 1923 is in effect a code governing the relations of landlords and tenants. It deals exhaustively with the matters dealt with by the Act of 1816, and is so much at variance with that Act that the Act of 1816 must be assumed to have been impliedly repealed. The modern methods of manuring a farm no longer require animals to be kept on the farm for

(1) (1809) 11 East, 210.

(2) 13 East, 522.

the purpose of manuring it. The Act of 1923 by s. 30 releases a tenant from any restrictions in his tenancy agreement on his right to dispose of the crops of the holding except during the last year of the tenancy. It would be a very odd result if the Act of 1923 releases a tenant from his obligations under his tenancy agreement but does not release a purchaser from the tenant from his liability under the Act of 1816. The proviso to s. 30, sub-s. 1, of the Act of 1923 means that the purchasers from a tenant are protected, but puts upon the tenant a substituted obligation—namely, returning to the holding the full equivalent manurial value to the holding of all crops removed from the holding in contravention of the agreement. It can never have been intended by the Legislature to put such a burden upon hay dealers so that, by reason of something done by another party to which the hay dealer was not a party, an act which was lawful when done becomes unlawful. The Act of 1816 must be limited to purchases of hay, etc., in the last year of the tenancy, and which was known by the purchaser to be the last year of the tenancy. It was held in *Hawkins* v. *Walrond* (1) that a landlord who had distrained hay, etc., for rent in arrear could not lawfully sell the distress under a condition that the purchaser should consume it on the premises, as the obligation of the landlord was to sell the distress for the best price.

Hon. S. O. Henn Collins K.C. in reply. The respondents did not buy the stacks of hay but the good marketable hay in the stacks. They were not bound to take delivery of the stacks but of trusses of hay cut from the stacks. Up to the time the hay was cut and tied the property in the hay was in the seller. The property in the hay had not passed to the buyers at the time the landlord levied the distress.

Cur. adv. vult.

Feb. 25. The following judgments were read:—

GREER L.J. By an agreement of tenancy dated May 17, 1926, a farmer named Lockey agreed to take a farm in the county of Durham known as the Elstob Hall Farm from the appellant, Lord Eldon, as tenant from year to year, at a yearly rent of 194*l.* payable as therein mentioned, and by clause 25 of his agreement the tenant agreed not to dispose of any hay, etc., that may have been grown on or brought on to the farm, but to consume such hay, etc., by stock on the farm and in the proper manner. The tenant in fact occupied the farm under the terms of this agreement until May 13, 1933, under the circumstances which I shall presently state. Meanwhile in May, July and October of 1932, having a quantity of hay in stacks on his farm and being desirous of converting some of the hay into money, he entered into three contracts dated May 19, July 26 and October 27, 1932, for the sale of hay to the defendants in the action, Messrs. Hedley Brothers, who carry on business as dealers in hay, straw, etc., in, amongst other places, the counties of Durham and Northumberland. At the time when these contracts were entered into Lockey was still the tenant and could not in the ordinary course determine his tenancy before May 13, 1934, and as far as the defendants could know the sales were made at a time which in the ordinary course would not have been in the last year of his tenancy. But in November, 1932, the plaintiff, by his agent, agreed in response to a request from the tenant that the tenancy should determine on May 13, 1933. He was later allowed to quit the farm lands at a date in March, but to retain the farm-house till May 13. It is immaterial which date is regarded as the date when his tenancy terminated. The agreed termination of his tenancy, therefore, brought about the position that the sales of the hay took place in what turned out to be the last year of the tenancy, though this could not have been known either to the farmer or to the defendants at the respective times of the sales. It may not be immaterial to observe that as a rule a purchaser of hay would not know whether he was or was not buying in the last year of the tenancy, as that would depend on the terms of the tenancy about which he would be unlikely to inquire, or might depend upon some new arrangement made between the landlord and tenant either before or after the date of the sales.

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(1) (1876) 1 C. P. D. 280.

On January 17, 1933, the plaintiff having heard of the said contracts of sale, by his agent gave notice to the defendants that the tenancy agreement would terminate in May, and that the sales would only be recognized on condition that the hay purchased by the said contracts should be consumed on the holding, and that under no circumstances would he allow any of the hay to be removed.

On or about February 13, 1933, the plaintiff levied a distress upon the said farm for 161*l.* 4*s.* 8*d.* rent then due and in arrear. The bailiff on going on to the farm found that the defendants were in the process of cutting into the stacks of hay in respect of which the contracts were made, and taking them away. A certain portion had already been removed, and notwithstanding the presence of the bailiff the defendants removed all the hay from the stacks mentioned in the contracts.

The plaintiff then brought an action against the defendants based on two alternative grounds of claim: (1.) that the act of the defendants constituted a pound-breach, that is to say, an unlawful interference with the plaintiff's distraint of the said hay, claiming 191*l.* 17*s.* 3*d.* as treble damages in respect of this cause of action, and (2.), in the alternative, claiming 102*l.* as damages for the removal of the hay contrary to the express provisions of s. 11 of the Act to regulate the sale of farming stock taken in execution (56 Geo. 3, c. 50), which became law in 1816. If the property in the hay which was removed had, before the distress, passed to the defendants, the claim for treble damages necessarily failed, inasmuch as the defendants had given the proper notice under the Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), and the hay being their property was protected from distraint by that statute. The claim for treble damages on the ground of pound-breach turned entirely on the question whether the property in the hay had passed before the bailiff was put in to levy the distress. The other question turned on the true construction of the Act of 1816 as amended or modified by the Agricultural Holdings Act, 1923.

The first question to be decided is whether the property in each of the stacks passed to the buyers at the date of the contracts of sale. If it did so pass, it is not now in dispute that the respondents gave the necessary notices to protect them from distraint as required by the Law of Distress Amendment Act, 1908, though even if the property did so pass it will be necessary to consider whether or not the removal of the hay was in breach of the 1816 statute to which I have referred, and whether the appellant was entitled to damages by reason of the respondents' breach of that statute, which is still in force with regard to the last year of an agricultural tenancy. It is clear law that in construing a contract the Court is entitled to look at the surrounding circumstances existing at the date of the contract: see for example per Lord Esher M.R. in *Roe* v. *Siddons* (1), and per Bramwell B. in *Brown* v. *Fletcher*. (2) This principle is so well known and has been so often acted upon that I would not have thought it necessary to cite authorities in support of it if the appellant's counsel had not strenuously contended that nothing could be looked at except the words of the contract. The law on this subject is summarized, and the relevant authorities referred to, in Salmond on Contracts, at pp. 106 and 107.

The material circumstances to be taken into account for the purpose of construing the contracts of sale in the present case are these. The vendor was a farmer whose business necessarily included from time to time the sale of agricultural produce. The buyers were a well known firm of dealers in hay, straw, etc., who have a very large business in the course of which they are accustomed to buy a very large percentage of the hay they want for their business in the form of the purchase of stacks standing upon farms, and to pay for them at or about the time of bargain as much as from 90 to 100 per cent. at an agreed price per ton for the estimated tonnage of the stacks so purchased. It was proved that it is a very common practice in the hay market for dealers to buy hay in stacks sometimes for a lump sum for the stack as it stands, sometimes for a price per ton, which of necessity cannot be ascertained until the time for delivery arrives, and that purchases of stacks, even though weight and price necessarily remain to be determined at the time of delivery, are regarded by all persons interested in the market as passing the property in the stacks at the time of the bargain. I doubt whether this evidence is sufficient to justify the finding of a custom to the effect that the property passes on contracts in the particular form in which the contracts were drawn up in this case, but I think the fact that purchases of stacks are in the hay trade usually made on terms which are considered as passing the property in the stacks to the purchaser is one of the surrounding circumstances which may be given in evidence and considered by the Court in interpreting a contract for the sale of a stack. It was also proved or admitted that before making the contracts for the purchase of the hay the respondents visited the farm, selected the stacks they were prepared to buy, and tested the quality by an instrument. It was only after this had been done that contracts in the terms stated in the contract notes in the present case were made. The contract note of May 19 is in the following words:—

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(1) (1888) 22 Q. B. D. 224, 233.

(2) (1876) 35 L. T. 165, 167.

"Hedley Bros. to take no mouldy hay".

> "Sold by J. Lockey, Elstob Hill, Great Stainton, Stockton, to Hedley Bros., Tyne Crushing Mills, 28 & 32, Side, Newcastle-on-Tyne, two stacks of old land hay standing at his farm. Price twenty two shillings and sixpence per ton. Put free on rails at Elstob Station. Cutting and tieing to be done by Hedley Bros. Delivery of same to be taken when convenient, and only good marketable hay, clear of mould, to be delivered in a dry condition. Any dispute arising therefrom to be settled by arbitration. The seller agrees to keep hay insured until delivery is taken. Insured against fire with
> Received the sum of twenty five pounds in part payment of same."

The other contracts, though not in identical words, are in essential matters in the same form.

The relevant sections of the Sale of Goods Act, 1893, to be considered are ss. 16, 17 and 18.

It was argued for the appellant that the contracts in the present case were not contracts for the sale of specific or ascertained goods, but were contracts for the sale of unascertained or future goods by description; and secondly, that even if the contracts were contracts for specific goods, rr. 2 and 3 of s. 18 made it necessary to hold that the property did not pass. In my judgment the sales were sales of ascertained and specific goods—namely, the stacks of hay mentioned in the contracts as standing on the farm which had been seen and identified by the buyers, but that they were so bought and the property passed subject to the right of the buyers, when they came to cut and tie into trusses the hay in the stack, to reject any part that turned out to be not good marketable hay clear of mould. It is to be observed that delivery is to be taken by the buyers "when convenient," the only obligation of the seller being to permit the buyers to come and take delivery by cutting the stack into trusses and tieing them, and the price is to be a price put free on rails. As is usual, after the goods had been trussed and tied, the farmer took them on his carts to Elstob Station, but I do not think this means that there was to be no delivery and no passing of the property until the goods were put free on rails at the station. I think all that is meant by the words "price . . . . put free on rails at Elstob Station" is that the farmer having allowed the buyers to take delivery at the farm at a time convenient to them, undertakes that he will either cart the goods to the station himself, or will allow a reduction in the price for the cost of carting them to the station. Taking into consideration the terms of the contracts, the conduct of the parties, and the circumstances of the case, I am of opinion that the intention of both seller and buyers was that the property in the stacks should pass to the buyers at the date of the contracts, and that the special terms of the contracts entitling the buyers to refuse to take delivery of or to pay for mouldy or unmarketable hay did not prevent the property from so passing, but only operated to enable the buyers, though they had become the owners of all the hay in the stack, to refuse to take delivery and so revest in the seller any hay found to be mouldy or unmarketable at the time of delivery. In so deciding I am applying the provisions of s. 17 of the Sale of Goods Act, and holding that rr. 2 and 3 of s. 18 have no application to this case, because a contrary intention appears by reason of the considerations mentioned in s. 17. I think this view of the law laid down in the Sale of Goods Act, a codifying statute, is in accord with the opinion expressed by the Court of Queen's Bench in *Martineau* v. *Kitching.* (1) In addition to *Martineau* v. *Kitching* (1) a number of cases were cited as to sales before the Sale of Goods Act, but the decisions in these cases are not all consistent with one another, and I do not think any useful purpose will be served by considering them.

For these reasons I am of opinion that the judgment of the learned Commissioner in so far as he decided that the appellant was not entitled to recover damages for pound-breach was right.

It remains to consider whether he was right in refusing to enter judgment on the claim for damages on the ground that the removal of the contents of the stacks was a breach of the Act of 1816 as modified by the Agricultural Holdings Act, 1923. Sect. 11 of the 1816 Act (inter alia) provides that no purchaser of the goods, chattels, stock or crop of any person or persons engaged or employed in husbandry on any lands let to farm, shall take, use or dispose of any hay, etc., in any other manner and for any other purpose than such person engaged in husbandry ought to have taken, used or disposed of the same. It was held in 1853 in the case of *Wilmot* v. *Rose* (2) that an action could be brought by a landlord against a purchaser of hay from a farmer for damages for taking any straw by purchase from the farmer contrary to the provisions of the Act of 1816. It was held that the statute applied to any purchaser, and not merely to a purchaser from a bankrupt, or under an execution. This was a judgment of the Queen's Bench Division and not of an appeal Court,

(1) L. R. 7 Q. B. 436.

(2) 3 El. & Bl. 563.

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ELDON (LORD) v. HEDLEY BROTHERS.

Greer L.J.

but even if we thought it wrong it would not be right to reverse it after it has stood for over eighty years. The effect of s. 30, sub-s. 1, of the Agricultural Holdings Act, 1923, which repeated the provisions of the Act of 1908, is to free an agricultural tenant from any obligation by contract which he may have made with regard to the disposal of the produce of the holding, provided he has previously made provision for the return to the holding of the full equivalent manurial value to the holding of all crops, etc., sold by him in contravention of his contract. The sub-section also says its provisions shall not apply in the case of a tenancy from year to year, as respects the year before the tenant quits the holding or any period after he has given or received notice to quit which results in his quitting the holding, and (*b*) in any other case, as respects the year before the termination of the tenancy. I think it is quite clear that the tenant in this case was not freed from the obligations of his contract by the provisions of s. 30, sub-s. 1, of the Act of 1923, because there is no evidence that he made any provision for the return to the holding of the full equivalent manurial value of the hay, and it seems highly probable that he did not make any such provision. Nor could he acquire any benefit from s. 30, sub-s. 1, as the sale and removal of the hay in fact took place in the year before he quitted the holding. The farmer was, therefore, a person who by reason of his contract of tenancy ought not to have taken, used or disposed of the hay otherwise than as provided for in his agreement of tenancy. Messrs. Hedley Brothers as purchasers from him stood in his shoes, and therefore they were committing a breach of the statute, for which the landlord was entitled to claim damages.

In order to establish a cause of action for breach of the statute it was necessary for the plaintiff to prove that he had sustained damage thereby. He contended (1.) that the amount of his damage was agreed at the sum of 102*l*., and in the alternative that this was the proper amount of damages. When this case was argued we were left in some doubt on the question whether there had been an agreement between counsel to the effect that if the defendants should be held to be liable for damages for breach of the statute of 1816 the amount of the damages was agreed by counsel on both sides at the sum of 102*l.*, but after an adjournment for further consideration we were satisfied that such an agreement was in fact made, and that the plaintiff was therefore entitled to judgment for the sum of 102*l.*

The order that will be made by this Court is that the appeal will be allowed, that the respondents pay to the appellant the costs of the appeal except the costs attributable to the issue relating to the passing of the property in the hay, which are to be respondents' costs in the appeal, that judgment is to be entered for the appellant for 102*l.* damages with costs, except such of the costs as are attributable to the issue above mentioned, which are to be the respondents', and that there be a set-off of the costs payable by the appellant and the costs payable by the respondents when ascertained on taxation.

SLESSER L.J. The material facts in this case are as follows:—

On May 17, 1926, the plaintiff, Lord Eldon, let to a Mr. Lockey a farm and premises as from May 13, 1926, from year to year. The tenancy agreement contained in clause 25 an obligation on the tenant " not to dispose of any hay . . . . that may have been or may be grown on or brought on to the farm . . . ., but to consume such hay . . . . by stock on the farm in a proper manner, and the tenant shall not be released from liability under this clause by reason of the loss or destruction of any hay . . . . by fire or otherwise. Also not to dispose of any manure . . . . which shall have been or shall be made on . . . . the farm, but to spread the same annually upon the lands most proper for receiving the same, except any made during the last six months of the tenancy, which shall be left on the farm . . . . for the use of the landlord.

The tenant entered into occupation, and on October 26, 1932, he asked the landlord to allow him to terminate his tenancy on May 13, 1933. The landlord replied, through his agent, that he would do so if he could find a suitable tenant, and on November 18, 1932, the landlord's agent, a Mr. Scrope, wrote to Mr. Lockey that he had been able to let the farm on May 13 next and agreed that the tenancy should terminate on that date. In fact the tenant left the premises on March 9, 1933.

Meanwhile, during 1932, on the following dates, May 19, July 26, and October 27 respectively, Mr. Lockey entered into agreements with Hedley Brothers, the defendants, under contract notes, the legal effect of which I discuss hereafter, to sell certain stacks of hay standing at the farm. But for the provisions of s. 30 of the Agricultural Holdings Act, 1923, such sales, which provided for the hay to be put free on rail, would have constituted a breach of clause 25 of the tenancy agreement above mentioned, since the purpose of the contracts was a disposition of the hay by sale and an agreement for dealing with it otherwise than by consumption by stock on the farm as in the tenancy agreement provided.

Sect. 30 of the 1923 Act provides in sub-s. 1 that notwithstanding the provisions of any contract of tenancy respecting the disposal of crops, a tenant of a holding shall have full right to dispose of the produce of the holding without incurring any penalty, forfeiture or liability. But it is further provided that this sub-section shall not apply in the case of a tenancy from year to year as respects the year before the tenant quits the holding, and as the agreements to sell were made in 1932, during the period of a year before the tenant quitted the holding, that is before March 9, 1933, or if the date of the actual termination of the tenancy be taken, May 13, 1933, the protecting provisions of s. 30 cannot, in my opinion, apply to the case, and, consequently, the tenant made these agreements in breach of his tenancy agreement with the landlord.

I pass next to the Act which affects the defendants in this case, by reason of which it is said that they are liable in damages to the plaintiff. That Act is the Sale of Farming Stock Act, 1816, which by s. 11 provides as follows: "And be it further enacted, that no assignee of any bankrupt, or of any insolvent debtor's estate, nor any assignee under any bill of sale, nor any purchaser of the goods, chattels, stock, or crop of any person or persons engaged or employed in husbandry on any lands let to farm, shall take, use, or dispose of any hay, straw, grass or grasses, turnips, or other roots, or any other produce of such lands, or any manure, compost, ashes, seaweed, or other dressings intended for such lands, and being thereon, in any other manner and for any other purpose than such bankrupt, insolvent debtor, or other person so employed in husbandry ought to have taken, used, or disposed of the same, if no commission of bankruptcy had issued, or no such assignment or assignments had been executed, or sale made."

In *Wilmot* v. *Rose* (1) it was held that the prohibition on purchasers of stock was not confined to purchasers under an execution, notwithstanding the title and preamble of the Act, but that s. 11 of the Act, in the language of Erle J. (2), "prohibits the party who purchases farming stock, being on the land, from using it contrary to the terms of the letting." It follows that the defendants, in agreeing to purchase this hay and removing it from the farm, at dates and in circumstances which I discuss later in another connection, did dispose of the stock in a manner contrary to the terms of the letting and, consequently, in breach of the statute.

Under the tenancy the landlord was entitled to have the hay consumed on the farm whereby the land would have acquired a manurial value, and as a consequence of such breach of the statute the landlord has lost this value, which is the measure of damages. Apparently the parties at the trial agreed the damages for the loss of the manurial value of the hay at 102*l*.

On this issue the learned Commissioner has held the landlord is not entitled to recover on the ground that at the dates of the contracts "neither the landlord nor the tenant nor the defendants could know that the tenancy would end within the year," and comes to the conclusion that "it is not correct to say that because subsequent happenings between the landlord and tenant which by their nature had the effect

(1) 3 El. & Bl. 563.

(2) Ibid. 571.

of causing the contract dates to fall within the period of the year before the tenant quits that therefore the contracts were rendered illegal."

I disagree. Apart from the 1923 Act there can be no doubt that any dealing with the hay, other than in the manner provided by the agreement between the landlord and the tenant, would have been a breach of the tenant's covenants. The common law right of the landlord to maintain his covenants is invaded to a limited extent by s. 30 of the Agricultural Holdings Act, 1923, but to avail himself of that invasion I think that it is necessary that the tenant or those claiming under him should in fact be able to bring themselves within the protecting terms. "It is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law": per Byles J. in *Reg.* v. *Morris.* (1)

I think therefore that the ignorance of the purchasers, that the hay which they removed turned out in the event to have been removed within the year before the tenant quitted the holding, is not material, and in my judgment the landlord is entitled to say that the 1923 Act does not apply in fact to protect the tenant in this case and that, consequently, on the application of the Act of 1816 he is entitled to damages. So much therefore of the appeal of the landlord as relates to damages for breach of the 1816 statute succeeds to the extent of 102*l.*, and he should recover damages to that amount.

Lord Eldon's second way of putting his claim raises a different problem. On February 13, 1933, there were arrears of rent amounting to 161*l.* 4*s.* 8*d.*, and, on the instructions of the landlord, a bailiff attended at the farm to levy a distress. He states that he found the defendants' men engaged in cutting and in tieing the hay, which was then being carted to the railway station. Some 7½ tons had already been carted to the railway before his arrival and a further 10 tons had been cut and tied. Thereupon the bailiff purported to impound the stacks, and on the next day the defendants served a notice in writing under the Law of Distress Amendment Act, 1908, claiming that the hay was their property and that the tenant had no right of property in the goods. The authority of this notice is scarcely contested save on the assumption that the tenant in reality had still an interest in the hay. The defendants continued thereafter to cut and tie, and have removed, the hay, all of which was subsequently taken from the farm. Thereafter, the landlord claimed treble damages for wrongful removal of the hay by pound-breach under s. 3 of the Sale of Distress Act, 1689, and claimed therefor 191*l.* 17*s.* 3*d.*, or, if the claim for treble damages be waived, 63*l.* 19*s.* 1*d.* It is this claim which is the subject-matter of the second ground of appeal.

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(1) (1867) L. R. 1 C. C. R. 90, 95.

The decision on this part of the case depends primarily on whether, at the time of the removal of the hay from the farm, the property in it had passed to the purchasers by reason of the three agreements I have mentioned. If it had, the removal was a rightful removal, and the notice given by Messrs. Hedley to the landlord under the Law of Distress Amendment Act, 1908, that the tenant had no right of property or beneficial interest in the goods distrained was a true notice. If, on the other hand, the property had not passed, it is conceded that the removal of the impounded goods by the defendants was unlawful, so that the whole question turns upon the determination whether the property in the goods had or had not passed under the contract; that is, was it an agreement for the sale of the stack or only an agreement to sell so much of the stack as should be found to be good marketable hay clear of mould.

The language of the agreements does not make the determination of this matter easy. On the one hand, it is stated in terms that what are sold are stacks, on the other hand, the obligation to deliver is limited to good marketable hay clear of mould. The learned Commissioner, who heard much evidence as to the commercial usage, came to the conclusion that there was a usage of the trade, at any rate in Durham and its vicinity, in dealings between farmers and hay dealers that where a dealer makes contracts with a farmer, in a manner substantially similar to those in this case, the hay in the stack becomes on the signing of the agreement the property of the dealer at the time of the making of the contract, though with a right to leave the hay where it stands on the farm for a reasonable time to suit the purchaser's requirements. In this case he points out that " the defendants paid at the time an estimated sum of so much per ton calculated at and intended to be in these instances approximately 100 per cent. of the price of the purchase." These were the circumstances existing at the date of the contract, and it is extraordinarily unlikely if the parties had intended the agreements to be the purchase of uncertain goods, so that the purchasers would not know until it had been determined how much of the stack was not mouldy, and on what tonnage they would have to pay, that they would have paid in advance a sum of nearly 100 per cent. to cover the whole stack. It is much more probable that all they intended was to recover a rebate for the small amount anticipated of mouldy hay. There is no suggestion in the case that normally any considerable quantity of hay is found to be mouldy on cutting and tieing. Indeed, an examination of the stack is made by probing and other methods to satisfy buyers as to its integrity before the agreement is entered into.

The time of delivery in so far as it is a guide here to the intention of the parties is difficult to determine. On the one hand there is an obligation on the vendor to put the hay free on rail at the station. On the other hand the cutting and tieing which preceded the cartage to the rail is to be done by the purchasers. On the whole I am inclined to think that the intention of the parties, as derived from the documents and surrounding circumstances in which the agreements were made, was that the delivery should take place as and when the purchasers arrived to tie and cut and was a delivery of the whole stack and not only of the good marketable hay, and that the provision as to mouldy hay was no more than an exclusion of it in the final adjustment of the price.

It was further argued that, in so far as the seller would have to weigh the hay in order to ascertain the price, the property would not pass until the seller has so weighed the goods within the meaning of s. 18, r. 3, of the Sale of Goods Act, 1893. No direct provision for weighing is made in the agreements, but generally speaking, I think that the price was substantially ascertained at the time of entering into the agreements but was, in the language of Cockburn C.J. in *Martineau* v. *Kitching* (1), not finally adjusted but agreed upon at "a price estimated between them as the sum to be taken provisionally as the price for the goods." And again (2): "All that they intended to do by the final weighing was to see whether they had accurately ascertained the amount, which, according to the terms of the contract, they intended that the one party should pay and the other should receive." In other words, I do not think that this was a case where, after the price of the stacks had been fixed by tonnage and a sum expressed to be in part payment made, that there remained such an obligation on the seller to weigh for the purpose of ascertaining the price as would bring the case within s. 18, r. 3. Moreover the provision in the agreements that the seller is to keep the hay insured until delivered is to be taken as an indication that the property had passed to the buyer, who had become thereby concerned for its preservation.

For all these reasons, I agree with the learned Commissioner that the sale of the property in these particular stacks was a sale of ascertained goods at the date of the entry into the contracts and that, therefore, being the property of the defendants, the purchasers, they were entitled to remove them and entitled to avail themselves of the provisions of the Law of Distress Amendment Act, 1908.

I think, therefore, that this part of the appeal fails. The result will be that there will be judgment for the appellant for 102*l*. with an order as to costs as stated by my Lord.

EVE J. I have had an opportunity of reading the two judgments which have just been delivered and entirely agree with them; and have nothing to add.

Appeal allowed.

(1) L. R. 7 Q. B. 436, 449. (2) Ibid. 451.

C. A.
1935

Eldon (Lord) v. Hedley Brothers.

Solicitors for appellant: *May, May & Deacon.*

Solicitors for respondents: *Jaques & Co., for J. E. Freeman & Son, Darlington.*

R. F. S.

C. A.
1935
March 8.

MONROE BROTHERS, LIMITED *v.* RYAN.

[1934. M. 53.]

Shipping—Charterparty—Ship "expected ready to load about" certain date—Exception of "unavoidable hindrance beyond owners' control"—Subsequent Charter with other Charterers to be performed in meantime—Loading on that Charter delayed by bad weather—Ship in consequence late at loading port on first Charter—Claim by Charterers for demurrage and expenses—Whether Shipowners protected by Exception.

By a charterparty, dated August 2, 1933, shipowners chartered the ss. *Wythburn,* stated to be "expected ready to load about September 11, 1933," to charterers to proceed "with all convenient speed" to Hamburg and there load from the charterers a full and complete cargo of sugar and salt, and being so loaded proceed with all convenient speed to Merchants Quay, Kilrush, or so near thereto as she might safely get. The charterparty contained exceptions of (inter alia) "any other unavoidable accident or hindrances beyond charterers' or owners' control." On August 31, 1933, the shipowners chartered the s.s. *Wythburn,* "expected ready to load on or about September 6/7," to other charterers, to load a cargo of stone at Porthoustock (near Falmouth) for Felixstowe. The *Wythburn* arrived at Porthoustock on September 7, but owing to bad weather was unable to load until September 11, with the result that, after discharging at Felixstowe, she did not arrive at Hamburg until Sunday, September 17, and did not commence to load until September 18. The shipowners' agent at Hamburg on September 5 gave the shippers of the sugar and salt notice of readiness to load for September 14. The cargo was accordingly brought down to Hamburg in barges ready for loading on September 14. Owing to the delay in the *Wythburn* reaching Hamburg three days' demurrage was incurred in respect of the barges, and the vessel arrived off Kilrush too late for the spring tides. As the charterers urgently required the sugar, 80 tons were lightered whilst the vessel was waiting for the next spring tides. The shipowners sued the charterers to recover the balance of the freight. This claim was admitted, but the charterers counterclaimed for (inter alia) demurrage on the barges at Hamburg and lighterage at Kilrush. The shipowners relied on the exception in the charterparty of August 2 of " unavoidable . . . . hindrances beyond . . . . owners' control " as excusing the delay of the *Wythburn* in arriving at Hamburg :—

Held, that the exceptions in the charterparty did not apply to matters which happened before the ship entered upon the charterparty voyage, and as the unavoidable hindrance beyond the owners' control, which was relied upon by the shipowners, happened upon the voyage on the intermediate charterparty of August 31, and not upon the voyage on the charterparty of August 2, the shipowners could not rely upon the exception as a defence to the charterers' counterclaim.

Appeal from a decision of Atkinson J.

By a charterparty (in the " Merseycon " form) dated August 2, 1933, it was mutually agreed between Messrs. Monroe Brothers, Ld., managers of the good steamship called the *Wythburn* (or substitute at owner's option) expected ready to load about September 11, 1933, and Messrs. A. Ryan & Son, charterers :—

" 1. That the said steamer being tight, staunch, strong, and every way fitted for the voyage, shall with all convenient speed proceed to Hamburg . . . . and there load from the said charterers a full and complete cargo of 330 tons of sugar and 140 tons of salt . . . . and being so laden shall proceed with all convenient speed to Merchants Quay, Kilrush, and Ballylongford, or so near thereto as she may safely get."

" 3. The owners in all matters arising under this contract shall also be entitled to the like privileges and rights and immunities as are contained in ss. 2 and 5 of the Carriage of Goods by Sea Act, 1924, and in Article IV. of the Schedule thereto."

" 10. Charterers or owners not to incur liability for loss arising from frosts, floods, strikes, lockouts of seamen, workpeople or other persons necessary for the performance of this charterparty, disputes between masters and men, and any other unavoidable accident or hindrances of what kind soever, beyond charterers' or owners' control."

" 13. If any misrepresentation be made in respect of the size or position of the steamer, or should the steamer not be in Hamburg and ready to load within six days after the date stated above, charterers to have the option of cancelling this agreement."

On August 31, 1933, Messrs. Monroe Brothers, Ld., made a charter with other charterers in respect of the *Wythburn*, then trading and expected ready to load on or about September 6/7, but not before that date, to load a cargo of stone at Porthoustock (near Falmouth) for Felixstowe. This charterparty contained exceptions of (inter alia) perils of the sea and " all other hindrances whatsoever beyond owners' control."

The *Wythburn* arrived at Porthoustock on the evening of September 7, 1933, but owing to an unusual spell of easterly gales was unable to load until the evening of September 11, with the result that, after discharging at Felixstowe, she did not arrive at Hamburg until Sunday, September 17, and did not commence loading until September 18.

At the request of the shippers of the salt, the charterers, through their Liverpool agent, had, prior to August 31, asked the shipowners to give to the shippers of the sugar and salt eight days' notice of readiness to load, and on September 5 the shipowners' agent in Hamburg gave to both shippers notice of readiness for September 14. The cargo was accordingly brought down to Hamburg in barges ready for loading on September 14.

On September 1 the charterers' Liverpool agent, having received from the shipowners details of the vessel's movements, informed the charterers that the vessel, then on passage to Ballinacurra, would proceed thence to Porthoustock to load for Felixstowe and thence to Hamburg for about September 14. On September 7 the charterers replied to their agent that they noted steamer would not be ready to load until about the 14th, but hoped that if it was possible to load a bit earlier the agent would press the shipowners to do so, as the charterers were sold out of sugar.

Whilst the vessel was being held up at Porthoustock the charterers' Liverpool agent asked the shipowners to send the vessel direct to Hamburg, but the shipowners decided to wait for the stone cargo.

Owing to the delay in the *Wythburn* reaching Hamburg three days' demurrage was incurred in respect of the barges, and the vessel arrived off Kilrush too late for the spring tides. As the charterers urgently required the sugar, 80 tons were lightered whilst the vessel was waiting for the next spring tides.

The shipowners sued the charterers to recover 61*l.* 1*s.* 6*d.* balance of freight. The claim was admitted, but the charterers counterclaimed for (*a*) demurrage on barges at Hamburg 45*l.*; (*b*) lighterage at Kilrush 15*l.* 11*s.* 6*d.*; and (*c*) loss on resale of sugar 60*l.*

Atkinson J. held that the making of the charter of August 31 was a breach of the warranty "expected ready to load about September 11" contained in the charter of August 2, as the inevitable effect was to prevent the vessel getting to Hamburg until September 14 at the earliest, and that the charterers had not assented to such variation of their contractual rights. Although the weather was too bad to allow the vessel to load at Porthoustock it was not too bad to prevent the vessel from proceeding to Hamburg had the shipowners decided not to wait for the stone cargo. As the shipowners were in breach they could not avail themselves of the protection afforded by the exceptions. He accordingly decided in favour of the charterers in respect of claims (*a*) and (*b*) in the counterclaim, but disallowed (*c*) as being too remote.

The shipowners appealed.

Le Quesne K.C. and *H. I. Nelson* for the shipowners. The words "expected ready to load about September 11," although admittedly contractual, only amount to a warranty, which must be made honestly and on reasonable grounds, as to the vessel's position at the time the charter is made: *Corkling* v. *Massey* (1); *Finnish Government* v. *Ford* (2); *Samuel Sanday & Co.* v. *Keighley, Maxted & Co.* (3) In *Thomas Nelson & Sons* v. *Dundee East Coast Shipping Co.* (4), where the facts were very similar to those in the present case, the Court held

(1) (1873) L. R. 8 C. P. 395.
(2) (1921) 6 Ll. L. Rep. 188.
(3) (1922) 27 Com. Cas. 296.
(4) 1907 S. C. 927.

the shipowners responsible for a breach of their obligation to proceed to the loading port with all convenient speed, because they had by their own act in undertaking other engagements for their ships which rendered it impossible for the ships to arrive at the loading port until after the cancelling date, put it out of their power to fulfil their contract. That case is an authority for saying that in the present case the shipowners had up to September 17 within which to tender the ship. The clause " expected ready to load on or about September 11 " does not impose an absolute obligation upon the shipowners to get the ship to the loading port by September 11. The parties must be taken to have agreed by the correspondence that the charterparty would be satisfied if the vessel arrived at the loading port by September 14. The *Wythburn* did not arrive at the loading port by September 14 by reason of her fulfilling the charter of August 31 to carry stone. There was an interval of six weeks between the entering into of the charterparty of August 2 and the date when it was to be performed, and it could not have been expected that the ship should do nothing during that period. It was therefore reasonable for the shipowners to enter into the charterparty of August 31 for the *Wythburn* to go to Porthoustock in Cornwall and load a cargo of stone for Felixstowe. The shipowners were prevented from loading the stone by reason of bad weather, and in consequence the ship did not arrive at Hamburg, her loading port under the charter of August 2, until September 18; but the shipowners are excused for the consequences of that delay by the exception of "unavoidable hindrances . . . . beyond . . . . owners' control." It is true that the words " proceed with all convenient speed " began to operate from the time the charter was made, but if it was reasonable for the shipowners to enter into the intermediate charterparty then the obligation to proceed with all convenient speed must be read subject to such intermediate charter. The nearest case to the present one is *Hudson* v. *Hill*. (1) In that case the vessel was chartered for a homeward voyage from Barbadoes, but was allowed to take a cargo to

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(1) (1874) 43 L. J. (C. P.) 273.

Rio on her outward voyage, and it was held that the exceptions in the charter for the voyage from Barbadoes applied during the outward voyage to Rio. That case is cited in Scrutton on Charterparties, 13th ed., p. 124, as an authority for the proposition that the excepted perils in the charter apply to the preliminary voyage to the port of loading. It was held in *Barker* v. *M'Andrew* (1), where the ship was lying at her port of loading but had to move from the place where she was lying to a loading berth, that the voyage to which the exceptions related commenced as soon as she broke ground to go to that berth. It was also held in *Bruce* v. *Nicolopulo* (2) that the preliminary voyage to the port of loading was to be considered part of the voyage within the contract. In *Crow* v. *Falk* (3) the vessel was at Liverpool and was to load and sail with a cargo from thence, and it was held that the voyage did not commence, and the exception did not apply, till she quitted Liverpool. That case, however, was doubted in *Barker* v. *M'Andrew* (1) and also in *The Carron Park*. (4)

[GREER L.J. In *Hudson* v. *Hill* (5) the outward voyage was specially allowed by the charter, but in the present case all that can be said is that the intervening charter is not forbidden. It does not appear to have been argued either in *Hudson* v. *Hill* (5) or in *Harrison* v. *Garthorne* (6) that the exceptions commence as soon as the charter is made.]

It is immaterial that the intermediate voyage was not mentioned in the charterparty of August 2; it was, however, understood that such a voyage would be undertaken. In any case the wording of clauses 3 and 10 is sufficiently wide to protect the shipowners. The cost of lighterage at Kilrush is too remote to be recovered as damages by the charterers. If the charterers required the sugar for their own convenience they cannot charge that expense to the ship.

Chappell K.C. and *F. A. Sellers K.C.* for the charterers. The lighterage at Kilrush was reasonable and was necessary to prevent further loss to the charterers. The words in the charter of August 2, "expected ready to load about September 11," import a warranty that the shipowner will not do anything which will defeat that expectation. That implied warranty is coupled with the express warranty that the vessel shall proceed with all convenient speed to Hamburg. The fact that the shipowners put into the second charter that the ship was "expected ready to load on or about September 6/7," shows that the word "about" was intended to have a very limited meaning and would not extend the time for arriving at the loading port on the first charter after September 14. The shipowners by entering into the second charter, the result of which was that the ship could not arrive at her port of loading under the first charter until September 14, committed a breach of the first charter. The late arrival of a vessel at the port of loading but before the cancelling date, although not giving a right to cancel, may give a right to the charterers to claim damages. The shipowners are not protected by the exceptions in the first charter of "unavoidable hindrances beyond owners' control" against the consequences of such delay in arriving at the port of loading, as the unavoidable hindrance did not take place on the chartered voyage or on the voyage to the port of loading, but occurred while the ship was fulfilling the intermediate charter. It is stated in Carver's Carriage by Sea, 7th ed., sect. 148, that "the exceptions do not apply to matters which may happen before the ship has entered upon the voyage dealt with by the charterparty" and *Harrison* v. *Garthorne* (1) is cited as an authority for that proposition. The cases show that the excepted perils clause only commences to operate at the commencement of the chartered voyage, and there must be some physical motion of the vessel towards the fulfilment of the chartered voyage. An intermediate voyage has only been held to be part of the chartered voyage when the charterers expressly agreed to such intermediate voyage and when such intermediate voyage was defined, as in *Hudson* v. *Hill.* (2) The charterers in the present case never assented to the intermediate voyage with its consequent delay. The

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(1) (1865) 18 C. B. (N. S.) 759.

(2) (1855) 11 Ex. 129; 24 L. J. (Ex.) 321.

(3) (1846) 8 Q. B. 467.

(4) (1890) 15 P. D. 203.

(5) 43 L. J. (C. P.) 273.

(6) (1872) 26 L. T. 508.

(1) 26 L. T. 508.
(2) 43 L. J. (C. P.) 273.

result of the argument for the shipowners would be that if the shipowners had entered into several charters for intermediate voyages upon each of which some delay occurred, the charterers on the charterparty voyage would have agreed to the cumulative delays and would thereby lose the protection given by the cancelling date. The charterers in the present case accepted the risk of delay from the excepted perils in respect of their own charter; it would not, however, be right to put upon them, without very clear words, the risk of delay on all intervening charters. The shipowners had an option to supply a substitute, and if by the exercise of such an option they could have carried out their contract they were under an obligation to exercise their option accordingly.

Le Quesne K.C. replied.

GREER L.J. In this appeal we are concerned only with the counterclaim. The action was brought by shipowners to recover a sum of 61*l.* 1*s.* 6*d.* as balance of freight. There was no defence to the claim, but the charterers counterclaim for damages, amounting to 60*l.* 11*s.* 6*d.*, which counterclaim was allowed by the learned judge as damages for breach by the shipowners of the charterparty. The charterparty was dated August 2, 1933, and it is drawn up in terms which might create considerable difficulties in the mind of a tribunal accustomed to the precision of statements in documents which are usually drawn up by conveyancers, but it is a matter of common knowledge to people who deal with commercial documents, that there are great difficulties in drawing them up with great precision because of the way in which the documents are prepared, and the absence of sufficient consideration of the exact meaning of words that are used. So many commercial contracts, as it has been said, are done by the nod, that is to say, brokers meet in the market, one mentions a price and the other nods his head in assent, and they both understand and believe the usual form of contract will apply to the transaction. Very often it is a form of contract which is quite unsuited to the particular kind of transaction. One instance of that is the use of old mediæval forms at Lloyd's for insurance. It is quite a common thing for the name of a ship to be invented where there is no ship in the transaction at all, and although there is no voyage to be performed by any ship, and no insurance of any goods at sea. Frequently they do not strike out the exceptions to perils of the sea, but they leave them there to be applied, if they can be applied, to a voyage which has nothing to do with carriage by sea.

Here we are concerned with a charterparty where it has been found convenient to put, instead of a definite date, the words "expected ready to load," by a given date. The charterparty says: "It is this day mutually agreed between Messrs. Monroe Brothers, managers of the good steamship called the *Wythburn* (or substitute at owner's option) expected ready to load about September 11, 1933, and Messrs. A. Ryan & Son, charterers." It had been found in the experience of shipowners that it was a little difficult for them to undertake an exact date when the vessel would be ready to load and this clause was invented to meet that situation. It has been explained in one or two cases, especially in the case of *Samuel Sanday & Co.* v. *Keighley, Maxted & Co.* (1) by Lord Sterndale M.R., where he says (2): "I think that the second is the right view, that it is to be interpreted as meaning that in view of the facts, as known to the seller at the time of his making the contract and making the statement 'expected ready to load,' the expectation was one which was made, as Bailhache J. says in one of the cases, honestly and upon reasonable grounds." Now it is said in that and other cases that this statement is not a mere representation; it is a contractual statement, part of the contract between the parties, but it only means that they contract that the statement is honestly made upon reasonable grounds. That does not help us very much to determine what is the date on which the ship ought to be there. It is not left alone in the charterparty, because the charterparty goes on to say: "The said steamer being tight, staunch, strong, and every way fitted for the voyage, shall with all convenient speed proceed to Hamburg or so near thereunto as she may safely get, and there load from the said charterers a full and complete cargo," of sugar and salt. That, I take it, means in this charterparty that the vessel will proceed at a time when it is reasonably certain that she will arrive at the loading port on or about the expected date, and the expected date in this case is on or about September 11. In the absence of evidence it is difficult to determine what the exact effect of the word "about" is. The parties in this case in the correspondence have treated September 14 as within the area of the expected date, and I do not think we are entitled to differ from them in that respect. The charterers' complaint is: "We do not say we suffered any damage by reason of a breach of contract in the vessel not arriving before September 14, but we do say we suffered damage by reason of a breach committed by the vessel arriving at a later date."

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(1) 27 Com. Cas. 296.

(2) Ibid. 301.

The dates in this case are these: On August 31 the plaintiffs entered into another charterparty with the West of England Road-Metal Company, Ld., to carry stone from a place called Porthoustock to Felixstowe, and it is said that by doing so they broke their contract of August 2. I do not accept that argument. It must have been within the contemplation of the parties that between August 2 and September 14 the shipowners would, in fact, be using their vessel for such remunerative purposes as they could. I also think that the taking of that charter did not relieve in any way, or indeed affect the obligations of the shipowners under the charter of August 2, and by entering into that charter they took upon themselves the risk that by doing so they might be prevented from fulfilling the contract which they had made as early as August 2. In this connection I should like to refer to the case of *Thomas Nelson & Sons* v. *Dundee East Coast Shipping Co.* (1) The passage I wish to refer to is contained in Lord Pearson's judgment (2), which I think is correct. He said: "The defenders dwell on the expression

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(1) 1907 S. C. 927.

(2) Ibid. 935.

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'expected ready to load about 3rd March,' as if it left everything open, with the result that the charter is absolutely indefinite as to time in the important matter of the commencement of loading. I do not say that the words amount to an undertaking that she will be ready to load on 3rd March or even about 3rd March. But touching as they do a matter within the shipowners' own knowledge and control, they at least import, in my opinion, an assurance that the vessel was at the time in such a position that she might reasonably be expected to be in Leith ready to load by the day named. Now, although that assurance was well founded at the time it was made, and although the ship might with all convenient speed have proceeded to Leith in ample time, the defenders deliberately put it out of their power to fulfil the contract. If for any reason the *Alice* was not available, they had the option of substituting a sister ship. But as regards each of them it appears that the defenders interposed a new charter in such a way as to make it impossible for them to fulfil their contract with the pursuers with either ship. That of itself seems to me sufficient to infer liability in damages."

Although the shipowners in this case did not make a contract which by itself without anything more would bring about that result, they did, in fact, make a contract which in the long run did bring about the result that the vessel could not proceed with due diligence to the port of loading so as to arrive at the port of loading on or about the expected date. The only question is whether or not they were excused by reason of the exceptions in the charterparty from performing that obligation.

Now I am satisfied that there is no authority which carries the area of exceptions beyond the time when the ship starts on the agreed voyage. It is not confined to the time when she loads under the charterparty, but includes the period of time when she is steaming with all convenient speed to arrive at the loading port. I agree with the view expressed in Carver's Carriage by Sea, 7th ed., sect. 148, as follows: "But it seems that the exceptions do not apply to matters which may happen before the ship has entered upon the voyage dealt with by the charterparty." Blackburn J. used language in *Harrison* v. *Garthorne* (1) which appears to support that proposition, although there is no actual decision to that effect; but it seems to me sound sense that when you make an agreement for a particular voyage the whole of the terms of that agreement relate to that voyage, and not to something which may happen before that voyage begins. It is an unfortunate result that people who have to make engagements in advance necessarily run the risk of the engagements clashing with one another so as to prevent the performance of one or other of their contracts, and they have to take the consequences by paying damages to the party whose contract they, in the result, have failed to perform.

I think for these reasons this appeal fails, and must be dismissed with costs.

MAUGHAM L.J. I am of the same opinion, and I will only add a very few words. It must be remembered that this action relates to a Chamber of Shipping Coasting Charterparty dated August 2, 1933, entered into with regard to the *Wythburn*. The contract was in reference to a ship which was "expected ready to load about September 11, 1933," and there was consequently a period of six weeks between the date of the charterparty and the date when the ship was expected to be at Hamburg. It is perfectly clear, I think, in the case of such a contract as this that it was open to the shipowners to enter into another charterparty, and they did, in fact, enter into an intermediate charterparty on August 31, 1933, that being a Chamber of Shipping Stone Charterparty, with reference to the loading of certain stone at a port called Porthoustock in Cornwall. I agree entirely with what my Lord has said, that the exception of losses arising from a number of things, including unavoidable accident or hindrances, in clause 10 of the charterparty of August 2, 1933, does not apply to accidents and preventions and so forth incurred in the performance by the shipowners of the

(1) 26 L. T. 508.

subsidiary or intermediate charterparty, that being a contract which has nothing whatever to do with the charterers under the charterparty of August 2, 1933, and one with regard to which they have no interest.

If that conclusion is arrived at, there remains nothing but the question of dates, and with regard to that I do not think it necessary to add anything to what my Lord has said. The conclusion I have arrived at seems to me to be supported by the decision in *Barker* v. *M'Andrew* (1), where there is a remarkably clear judgment by James Shaw Willes J. (2), and it should be observed that we find his view supported by Blackburn J. and Mellor J. in the subsequent case of *Harrison* v. *Garthorne* (3), to which my Lord has referred. The vital part of the judgment of Willes J. for the present purpose is where he says (4): "The commencement of the voyage is the commencing to do that for which the shipowner is to be paid freight," and it will be found there is no case contrary to that view. That accords with all the reported decisions except one which I think has been doubted, and it applies also to a case such as *Harrison* v. *Garthorne.* (3)

In all other respects I agree entirely with what my Lord has said.

ROCHE L.J. I also agree. This case is for a small amount of money, but it raises some questions of nicety, which have been very well argued. As to the construction of this charterparty, and as to matters arising in this action generally, I agree so entirely with the reasoning of my Lord that I have nothing to add.

I desire to make a few additional observations as to the scope and effect of the exceptions clause. The question is this: The shipowners having entered into intermediate engagements for their ship, and particularly the intermediate engagement which arose out of the charterparty of August 31, did the fact that the voyaging of the vessel, in which

(1) 18 C. B. (N. S.) 759.
(2) Ibid. 770.
(3) 26 L. T. 508.
(4) 18 C. B. (N. S.) 772.

I include the loading under that intermediate charter, was prolonged by reason of bad weather excuse the shipowners in respect of the non-arrival of their ship under the antecedent charter of August 2 which is now in question? In my opinion it did not, and for this reason. The argument for the shipowners is based upon the view that the voyage in question and the period in question for the purpose of the exceptions clause began from the time the charter of August 2 was made, and from the time the vessel began to act upon and fulfil intermediate engagements. I have no doubt there are charterparties in existence which do so provide, and I have no doubt there will be charterparties in the future which will so provide; but I am satisfied that this charterparty did not so provide. The trouble arose because the parties applied a printed form of charterparty applicable to a case where the ship was to enter immediately upon the engagements covered by that charterparty, to a case where she was not going to enter upon such engagements for six weeks, and was to perform an intermediate voyage. That charterparty required an alteration if it was to give the protection which was desired. I arrive at my conclusion from a brief examination of the clauses. As to clause 1 it is apparent that the obligation to proceed with all convenient speed and the correlative obligation that the vessel should be tight, staunch and strong, that is to say, seaworthy for the voyage, attach at the same time, that is to say, the time for beginning the specific contract voyage. The next clause that is material is clause 3, which applies to this charterparty by reference the provisions of the Carriage of Goods by Sea Act, 1924. Those provisions merely relate, when one looks at the Act, to the specific voyage which is to be made under the particular freight engagements in question. They do not refer to what I may call antecedent voyages. The next and last clause is clause 10; that is what is called a mutual clause protecting both charterers and owners. I am satisfied that the charterers would not be protected under that clause if they could not prove that by reason of the hindrances mentioned in the clause they were hindered from bringing the

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cargo to the place of loading, and equally, in my opinion, the owners have a correlative and similar protection and no more, that is to say, they are protected from that which may happen during the performance of the particular voyage which is stipulated for and regulated by that particular charterparty.

For these reasons I think this appeal fails as to liability, and I have nothing to add on the question of damages.

Greer L.J. I forgot to say anything about damages in my judgment, but I think we sufficiently indicated in the argument our view with regard to that claim.

Appeal dismissed.

Solicitors for shipowners: *Lightbounds, Jones & Bryan, for T. O. Ward, Liverpool.*

Solicitors for charterers: *Buckley, Watson & Blackwood, Liverpool.*

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CONSETT IRON COMPANY, LIMITED *v.* CLAVERING TRUSTEES AND OTHERS.

Mines—Working facilities—Whether wayleave rent an impediment to efficient and economic working—Jurisdiction of Railway and Canal Commission—Mines (Working Facilities and Support) Act, 1923 (13 & 14 *Geo.* 5, *c.* 20), *ss.* 3, 4, 5, 6—*Mining Industry Act,* 1926 (16 & 17 *Geo.* 5, *c.* 28), *s.* 13, *sub-s.* 2.

Sect. 13, sub-s. 2, of the Mining Industry Act, 1926, provides that " where the working of any coal, or the working of any coal in the most efficient and economical manner, is impeded by any restrictions terms or conditions contained in a mining lease, or otherwise binding on the person entitled to work the coal, a right to work the coal freed wholly or partially from such restrictions or conditions, or to work the coal on other terms and conditions, may, on an application for the purpose being made and referred to the Railway and Canal Commission under the principal Act, be granted by the Commission in any case where the Commission consider that it is expedient in the national interest that the right applied for should be granted to the applicant":—

Held (by Slesser and Roche L.JJ., Greer L.J. dissenting), that the word "impeded" in the sub-section relates exclusively to something which impedes or obstructs the actual winning or carrying away of coal, and does not apply to financial obligations imposed by his lease upon the lessee of the coal. The words "terms" and "conditions" are similarly restricted in meaning. The Railway and Canal Commission has, therefore, no jurisdiction to relieve the lessee from an obligation to pay a wayleave rent imposed by his lease in connection with the transport of his coal.

Decision of Railway and Canal Commission reversed.

APPEAL from a decision of the Railway and Canal Commission on an application by the Consett Iron Company, Ld., under the Mining Industry Act, 1926, and alternatively, under the Mines (Working Facilities and Support) Act, 1923, for the right to work coal freed from certain terms and conditions contained in their leases, and, alternatively, for ancillary rights to facilitate the working of the coal.

The applicants, who were the owners of certain collieries in Durham and Northumberland, were entitled to work an area of coal partly freehold and partly leasehold held under leases from various owners extending over an area representing ungotten coal of about 26,000,000 tons. They also owned shipping places on the River Tyne, and with the object of transporting coal thereto and also to the public railway now part of the London and North Eastern Railway Company's system, they acquired wayleave rights and constructed a mineral railway seven miles in length under a lease from Lord Ninian Crichton Stuart, dated 1891, in respect of a strip 1·4 miles in length and 12 acres in extent at a fixed annual rent of 55*l*. 14*s*. 7*d*., say 39*l*. 15*s*. 10*d*. per mile or 4*l*. 8*s*. 4*d*. per acre; under a lease from the Commissioners of Crown Lands dated 1929 over a strip ·778 mile in length and five acres in extent at a fixed annual rent of 125*l*., say 160*l*. 13*s*. 5*d*. per mile, or 25*l*. per acre; under a lease from the defendants the Clavering Trustees, dated 1890, a strip of 1·966 miles in length and 11·92 acres in extent at a certain rent of 150*l*. per annum, merging into a tentale rate for all coal carried over the railway

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on a sliding scale which on an average of the years 1931 and 1932 amounted to a net annual payment of 2893*l.*, say 1472*l.* per mile, or 243*l.* per acre; and under a lease from the defendants the Towneley Trustees two strips comprising 1·246 miles in length and 15·67 acres in extent at the following rentals: (*a*) an annual surface rent of 116*l.* 16*s.* 10*d.* and (*b*) an annual certain rent of 600*l.* merging into (*c*) a tentale rate on a sliding scale based upon the selling price of coal. On the basis of a selling price of 5*s.* 1·43*d.* per ton referred to in the lease, the tentale rent was equivalent to a tonnage wayleave of about ⅔*d.* per ton of coal carried, and at the average selling price per ton at the date of the application, namely, 11*s.* 6·304*d.* per ton, it was equivalent to a tonnage wayleave of 1·053*d.* on all coal carried. On the average of the years 1931 and 1932 the rent per ton of coal carried was 1·070*d.*, amounting to a net average annual payment, in addition to the surface rent of 116*l.* 16*s.* 10*d.*, of 2214*l.*, say 1776*l.* per mile or 141*l.* 5*s.* 9*d.* per acre.

The applicants contended that these terms were such as to impede the working and/or carrying away of the coal, or, alternatively, that they impeded the working and/or carrying away of the coal in the most efficient and economical manner. Accordingly, they asked for the right to use the mineral railway over the lands of the Clavering Trustees and the Towneley Trustees respectively freed from the tentale or tonnage rates then payable, and freed from the certain rent of 600*l.* payable under the Towneley lease, and from the certain rent of 150*l.* payable under the Clavering lease, for a period of ninety-nine years upon payment to the respective owners of a fixed annual rental to be assessed by the Commission.

By their answers the defendants denied that the terms contained in the leases to the applicants impeded the working and/or carrying away of the coal from the collieries in question; they further denied that those terms impeded the working and/or carrying away of the coal in the most efficient and economical manner within the meaning of the Acts or at all. The defendants further said that by reason of the said mineral wayleave the applicants had derived substantial advantages for a very long period of time on terms which were not more onerous than the terms customarily prevailing in the district for similar rights during the material period, and which were far less onerous than the cost of transport by other available means, such terms being, the defendants said, and had always been, considered as representing the fair value of the land used for the purpose and as representing what a tenant would willingly pay for the privileges in question.

The Railway Commission (MacKinnon J., Sir Francis Taylor and Sir Francis Dunnell) came to the conclusion on the facts that the applicants were or would be unduly hampered, and that their power of carrying away their coal in the most efficient and economic manner would be impeded by the wayleave rents payable under the leases; that it would be in the national interest to grant relief therefrom; that the Commission had jurisdiction under s. 13, sub-s. 2, of the Mining Industry Act, 1926—which section, in their opinion, was not limited in its operation to physical impediments to the getting or removal of coal but applied also to financial considerations—to grant relief in respect of the wayleave rents and to substitute therefor other terms which were fair in the circumstances. In this view they were supported by the decision of the Commission sitting in Scotland in the case of *Hope-Morley* v. *Carron Co.* (1), where relief was granted in respect of mining royalties. Accordingly, it was ordered that the applicants should have for the period of ninety-nine years from July 1, 1934, the right to use and occupy for the purposes of their operations the mineral railway in question freed from the tentale or tonnage rates and freed from the certain rents, surface rents, and all other payments reserved to the lessors, the Towneley Trustees and the Clavering Trustees, by virtue of the several leases, the consideration to be paid by the applicants being an annual sum calculated at the rate of 10*l.* for every acre of the described lands. It was further ordered that the applicants should not assign or underlet any of the rights granted to them except with the consent of the Commission.

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(1) Unreported. Decided Dec. 16, 1930.

The defendants appealed.

Wilfrid Greene K.C. and *Maurice FitzGerald* for the Towneley Trustees. The Railway and Canal Commission has no jurisdiction under the Mines (Working Facilities and Support) Act, 1923, or under the Mining Industry Act, 1926, to interfere with the appellants' monetary rights under the lease, or, at all events, cannot do so without giving compensation. The earlier of these statutes, which is described as "An Act to make provisions for facilitating the working of minerals and for imposing restrictions on the working of minerals required for the support of railways, buildings, and works," and which has this as the heading to Part I.: "Rights of working minerals and rights ancillary thereto and of support," empowers the giving of rights which the applicant does not at the time possess; it has no application to a case like the present, where the applicants already possess rights. Further, that Act is concerned with the working of minerals as a physical operation; the same applies to Part II. of the Mining Industry Act, 1926, which is headed "Working Facilities." The reduction of royalties or wayleave rents has no relation to the "working of minerals." It is true that under s. 13, sub-s. 2, of the latter Act "where the working of any coal, or the working of any coal in the most efficient and economical manner, is impeded by any restrictions terms or conditions contained in a mining lease, or otherwise binding on the person entitled to work the coal, a right to work the coal freed wholly or partially from such restrictions or conditions, or to work the coal on other terms and conditions," may be granted by the Commission if it considers this expedient in the national interest. But "the working of any coal, or the working of any coal in the most efficient and economical manner" there referred to being impeded obviously means impeded as a physical operation, and the Commission was wrong in construing the section by treating the existence of a wayleave rent as an impediment to the efficient working of coal. The

Commission sitting in Scotland, it is true, decided that it could interfere with mining royalties; but that case, which purported to be based on observations in *In re Tilmanstone (Kent) Collieries, Ld.* (1)—an authority which has no real bearing on the present case—was wrongly decided. If a royalty is to be treated for this purpose as an " impediment " it might with equal force be said that sums paid to debenture holders constituted " impediments." That cannot be right. Suppose a company had coke ovens on a piece of land which they leased from A. That company could not be heard to say: " If we paid a less rent to A we could treat the coke more economically, and therefore we are entitled under the Act of 1926 to have our rent reduced." Such a thing was never contemplated by this legislation, which is directed to the removal of physical restrictions on the most economical working of the coal. Further, an interference with private rights without compensation cannot be imputed to Parliament in the absence of clear words: *Attorney-General* v. *Horner* (2), where Brett M.R. said this (3): " It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so." See to the same effect *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co.* (4); *Colonial Sugar Refining Co.* v. *Melbourne Harbour Trust Commissioners.* (5) These authorities have apparently all been ignored by the Commission in this case.

David Bowen and *S. Pascoe Hayward* for the Clavering Trustees. There is no evidence that the applicants are being " impeded " in the working of the coal. An impeding in fact must be shown; a mere expectation that the applicants may

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(1) [1928] 1 K. B. 599.
(2) (1884) 14 Q. B. D. 245.
(3) 14 Q. B. D. 257.
(4) [1919] A. C. 744, 752.
(5) [1927] A. C. 343.

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be impeded in the future will not do. Further, the " terms " in s. 13, sub-s. 2, of the Act of 1926 have no reference to financial terms.

Wrottesley K.C. and *Rabagliati* for the applicants. By the Mines (Working Facilities and Support) Act, 1923, Parliament interfered with the rights of mineowners, and carried that interference still further by the Mining Industry Act, 1926, by enabling the Railway and Canal Commission to create new rights where excessive terms were being exacted by mineowners. The power thus devolved upon the Commission is in effect in the nature of delegated legislation, for Parliament recognized that if mining lessees were unable to carry on their business effectively by reason of having to pay excessive wayleave rents or royalties a state of things would be created which would not be in the national interest. Sect. 4, sub-s. 1 (*d*), of the Act of 1923 clearly contemplates the substitution of different rights where unreasonable terms are demanded, and royalties are mentioned in s. 6, sub-s. 5, of the same Act. Having gone thus far by the Act of 1923, Parliament in 1926 decided to go still further in the relief of mining lessees in order to forward the national interest—a decision which was not to be stultified by mineowners being allowed to ask extortionate terms for wayleaves or similar rights. By the use of the word " terms," Parliament clearly intended to include monetary terms, for which, if excessive, more reasonable terms could be substituted. The word " impeded " in s. 13, sub-s. 2, should not be construed in the narrow sense contended for by the appellants. As was said by Sargant L.J. in *In re Tilmanstone (Kent) Collieries, Ld.* (1), in reference to the Act of 1923, " such legislation should in general be read broadly, and should not have its obvious purpose cramped and stultified by fine drawn distinctions, and verbal niceties." In the same case Greer L.J. (2) rejected the contention that the Act of 1923 was concerned only with difficulties physically obstructing the carrying away of the coal, as he considered that economic or commercial difficulties were within the scope of the Act. So, in this case we say that a very high wayleave rent or royalty constitutes

(1) [1928] 1 K. B. 599, 607.

(2) Ibid. 610.

a serious impediment to the working of a mine. There was ample evidence to justify the finding of the Commission that the wayleave rents imposed by the leases did impede the efficient and economical working of the coal. It is contended on behalf of the appellants that in any view rights cannot be taken away without compensation, but it is obvious that if compensation had to be paid in such a case as this the applicants would be no better off, for what would be given them with one hand would be taken away by another. The principle enunciated in *Attorney-General* v. *Horner* (1) has been invoked on behalf of the appellants. That case, however, must be read in connection with the circumstances there being considered. There the Court was dealing with the effect of local paving and lighting Acts, which were not to be taken as interfering with ancient market rights. What was said in that connection cannot be applied to a statute whose whole object is to give relief to mining lessees by getting rid of restrictions, terms, and conditions impeding their efficient working.

Wilfrid Greene K.C. in reply. The word " terms " in s. 13, sub-s. 2, refers exclusively to things or conditions of such a character or quality as constitute an impediment to the actual working of the coal.

Bowen also replied.

Cur. adv. vult.

March 15. The following judgments were read:—

GREER L.J. These appeals turn on the true construction of s. 13, sub-s. 2, of the Mining Industry Act, 1926. The respondents, the Consett Iron Company, are the mining lessees of three mines known as the Whittonstall, Chopwell, and Garesfield Collieries, in the county of Durham. Under a lease which at the material time they had from the Towneley Trustees, and under a tenancy from year to year to which they were entitled by holding over after the termination of a lease from the Clavering Trustees, they were entitled to a certain wayleave over the lands of the said trustees and others whereby

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(1) 14 Q. B. D. 245.

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they were able to carry the coal from their said collieries to their coke ovens, and, as and when they required to do so, to the River Tyne. The total length of the wayleave was about seven miles, of which the Towneley Trustees owned 1·246 miles, and the Clavering Trustees owned 1·966 miles. The acreage of land in the case of the Clavering Trustees over which the wayleave ran was 11·92 acres, and in the case of the Towneley Trustees 15·67 acres.

The Towneley lease, dated December 30, 1916, provided that in consideration of the surrender of an earlier lease the lessors granted to the Consett Iron Company full and free right or liberty of wayleave and passage by means of the railway on the pieces of land coloured pink and green on the plans drawn on the lease, for the conveyance of coal, ironstone, iron ore, fireclay, and other materials, etc., to hold the same for the term of forty-two years from January 1, 1911, yielding and paying therefor the rent of 93*l.* 9*s.* 7*d.* for certain lands, and by way of wayleave rent the combined rent of 600*l.*, subject to a certain sliding scale dependent on the selling price of the coals sold at the Derwenthaugh staith, which was the terminus at the River Tyne of the wayleave.

Clause 32 of the lease contained a proviso under which the lessees could determine the lease at the end of any year of the said term on giving twelve calendar months' previous notice in writing, but they were by clause 25 put under an obligation at the end or sooner determination of the said term, if so requested by the lessors, to restore the site of the railway to its former state before it was applied for the purposes of the railway, or to pay compensation for not doing so.

In August, 1890, the Consett Iron Company had obtained a similar lease of the wayleave so far as it ran over the Clavering estate for forty-two years from January 1, 1890. This lease expired on January 1, 1932, and there were negotiations for renewal. In the meantime the Consett Iron Company continued to pay the rent reserved by the lease and were therefore tenants from year to year on the terms of the lease.

It was not argued that there was any distinction to be drawn as between the position of the Consett Company in the two tenancies on the ground that the tenancy from year to year might be determined by a shorter notice than the notice provided for in the Towneley lease.

The land through which the wayleave ran was in the main agricultural land which would have commanded a rent of about 3*l.* to 5*l.* per acre, but owing to the developments of the railway at the River Tyne end of the wayleave, the land had probably acquired some slight additional value for building purposes.

The extent of the burden placed on the Consett Iron Company by the respective leases of the wayleaves from the Clavering Trustees and the Towneley Trustees is stated by the company's solicitors in letters dated December 5, 1932, and the figures there stated were not in dispute. With regard to the wayleave over the Clavering land, the letter to the solicitors for the Clavering Trustees says: "The acreage occupied by the railway is 11·92 acres, and the amount of rent paid in the year 1931 was 3036*l.*, equivalent to about 255*l.* per acre per annum. Since January 1, 1890, when the company first became tenants of your clients, up to December 31, 1931, there has been paid in tonnage rent a total sum of 62,161*l.*, which, as you will perceive, greatly exceeds any possible fee simple value of the land. In effect, it works out at a capital amount on that period without interest of 5214*l.* per acre."

The statement with regard to the Towneley land is: "The acreage occupied by the railway is 15·67 acres, and the amount of rent paid in the year 1931 was 2375*l.* 5*s.* 2*d.*, equivalent to about 151*l.* per acre per annum. Since January 1, 1890, when the company first became tenants of your clients, up to December 31, 1931, there has been paid in tonnage rent a total sum of 93,370*l.* 10*s.* 6*d.*, which, as you will perceive, greatly exceeds any possible fee simple value of the land. In effect it works out at a capital amount on that period without interest of 5958*l.* per acre."

It seems to me quite clear that these rents were rents that the Clavering Trustees and the Towneley Trustees could not

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have obtained for their land but for the fact that it was absolutely necessary for the Consett Company to acquire the wayleave in order to enable their collieries to be worked. When land is compulsorily acquired under the Lands Clauses Act, the fact that it is wanted by a railway company or other undertaking cannot be taken into account as enhancing the value of the land to the landowner. This has been accepted as the principle applicable to the compulsory acquisition of land to which the Lands Clauses Act, 1845, applies: see especially per Fletcher Moulton L.J. in *In re Lucas and Chesterfield Gas and Water Board* (1), approved in the Privy Council in *Cedars Rapids Manufacturing & Power Co.* v. *Lacoste* (2) and *Swift & Co.* v. *Board of Trade.* (3)

This consideration is not without its importance when we come to consider the meaning of s. 13, sub-s. 2, of the Mining Industry Act, 1926. That statute must be construed having regard to the circumstances under which it was passed. There was a time when the right of a property owner to do what he liked with his own was firmly established in the common law of this country. (4) The owner of land was entitled to say: "I will retain the land in my own hands. I will not allow trespassers upon it, and if I am asked to lease my land, or any part of it, I will only do so if the proposed lessee is willing to pay that which I fix as the sum for which I am willing to part with the rights which the proposer desires to have granted to him." There came, however, a time when public policy demanded that some statutory limitation should be put upon the landowner's right to hold out for what may be called his pound of flesh, in cases where the public interest demanded that he should be put under an obligation to part with his land in return for compensation based on a fair valuation, excluding his right to say: "If a railway or public authority requires my land it must pay whatever I may demand." Numbers of private and public Acts of

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(1) [1909] 1 K. B. 16, 31.

(2) [1914] A. C. 569.

(3) [1925] A. C. 520, 534.

(4) [The exceptional power of the Crown in time of war within the realm is obviously not relevant here.—F. P.]

Parliament were passed containing provisions similar to those which were afterwards codified in the Lands Clauses Act, 1845, and later amending Acts. These statutes introduced what was a new principle into the law of this country—namely, that the right of a landowner to do what he liked with his own ought to be subject to limitations where the public interest in the development of the wealth of the country intervened and made it desirable that compulsion should be put upon reluctant landowners to part with their property when required for purposes of public undertakings such as railway companies, water companies, canal companies, and local authorities. It was after the law had already made these large restrictions on the right of a landowner to do what he liked with his land that the Mines (Working Facilities and Support) Act, 1923, was passed, and it was after the further inroad made by this Act upon the landowner's right had been in operation for three years that the Mining Industry Act, 1926, was passed. The Act of 1923 is described in the title as " An Act to make provisions for facilitating the working of minerals and for imposing restrictions on the working of minerals required for the support of railways, buildings, and works." We are only concerned with the first part of the title and with the provisions in Part I. of the Act. In s. 1 of that Act, in the circumstances therein mentioned, a right to work minerals might be conferred on any person having an interest in them, but the right provided by this section did not extend to granting a right to persons not already interested in the minerals.

Under s. 2 the contractual relation between the mining lessee and his landlords might be affected by an alteration of boundaries. If a change of landlords took place, seams taken from landlord A and transferred to landlord B would not necessarily be paid for at the same rate as that which applied under the existing lease, but would only be paid for on the basis of the fair price between a willing lessor and a willing lessee.

When Parliament was called upon to consider the Bill which ultimately passed as the Mines (Working Facilities and

Support) Act, 1923, they had to consider whether the principles that had been applied by the Lands Clauses Act to the acquisition of land for railway and other public purposes ought not in the national interest to be applied to the acquisition of facilities for the carrying on of one of the basic industries of the nation out of which so much of its industrial wealth has had its origin. It was apparent that the working of the mines might be unduly hampered by the inability of the mineowner to obtain facilities for working the mines, or for the conveyance of minerals away from the mines to the market except at a cost dictated by an unwilling landowner as the price of his willingness to grant the required facilities. It does not seem difficult to understand that it might be regarded as in the national interest that the right of a landowner to dictate terms to a mineowner should be controlled in a manner similar to that whereby the right of a landowner to refuse his lands for the purposes, say, of a railway, is controlled by the Lands Clauses Consolidation Act.

It may well be regarded as in the national interest that mineowners who bring to market large quantities of raw material, and are large employers of labour, should not have their operations hampered by the dictatorial powers which the landowner has at common law to fix the amount without which he will not consent to grant facilities which are essential to the proper and efficient working and carrying away of the minerals from the mine. Sect. 3 of the Act of 1923 accordingly made provisions for the compulsory grant by landowners of ancillary rights, and in particular for the grant of airways, shaftways, surface or underground wayleaves, or other rights for the purpose of access to or conveyance of minerals, or the ventilation or drainage of the mines. It is clear that such ancillary rights conferred by the provisions of the statute do necessarily restrict the rights of the landowner to demand whatever terms he thinks right for the grant of a right of way over his property. If a prima facie case is made out that a mineowner is unduly hampered by his inability or failure to obtain, say, a wayleave or right of way, and the Board of Trade is satisfied that a prima facie case is made out, then the Railway and Canal Commission may, if they are satisfied that the requirements of the Act have been complied with and that it is expedient in the national interest that the right applied for should be granted (see s. 6), by order grant the right on such terms and subject to such conditions, and for such period as the Commission may think fit, and upon such an order being made the right specified in the order shall, subject to the provisions of the Act, vest in the applicant. Where such a right is granted, such compensation or consideration as, in default of agreement, shall be determined by the Commission is to be paid or given by the applicant in respect of the acquisition of the right to such persons as the Commission may determine to be entitled thereto.

By s. 9 it is provided that where a right to work minerals or an ancillary right is granted or any restriction on the working of minerals is imposed under that part of that Act, the Commission may determine the amount and nature of compensation or consideration to be paid or given and the persons to whom it is to be paid or given, either at the time when they determine whether the right should be granted or the restrictions imposed or at any subsequent time, and the compensation or consideration is to be assessed by the Commission on the basis of what would be fair and reasonable between a willing grantor and a willing grantee, having regard to the conditions subject to which the right is or is to be granted.

It is plain that this statute made a very serious inroad on the rights of property of the landowner. It deprived him of the right to say: "I will not part with any interest in my property upon terms which will be fair and reasonable as between a willing grantor and a willing grantee, but only on such terms as I decide in my uncontrolled discretion I ought to be paid." It is quite true that this statute by itself only enabled the Commission to confer on a mineowner ancillary rights where there was no agreement in existence under which the mineowner was already exercising such ancillary rights, with the result that an anomalous situation was created whereby an owner who had not made any grant might have his right to oppose a grant determined against him subject to the payment of reasonable compensation as between a willing grantor and a willing grantee, whereas an adjoining owner who had already exercised his dictatorial powers as owner to exact a payment for the grant which was greatly in excess of that which was fair and reasonable as between a willing grantor and a willing grantee would be entitled to maintain the dictated terms of an existing agreement or lease.

It is not difficult to appreciate the considerations that operated in the minds of those who presented to Parliament the Bill which when passed became the Act of 1926. It was implicit in the Act of 1923 that it might fairly be considered reasonable to restrict the power of the landowner to dictate the terms on which he would permit the business of the mining lessee to be carried on, inasmuch as it might readily be deemed in the national interest that the business of getting and carrying to market minerals should not be hampered or impeded by the right of a landowner to hold out for an unfair price for a facility necessary to the carrying on of the business of the mining lessee.

On consideration it became apparent that the Act of 1923 failed at least in two respects to relieve the mining business from the burden of dictated terms. In the first place, the power of applying for and obtaining reasonable terms was confined to those who already held an interest in a mine, and in the second place, the Act of 1923 afforded no relief to a mineowner who was already by some agreement suffering the burden of dictated terms. One of the objects of the Act of 1926 seems to me to be to place mine prospectors, and mineowners who held mining facilities on what I have called dictated terms, in the same favourable situation as the Act of 1923 had placed existing mineowners who had not already become subject to the burden of such terms. In my judgment, s. 13, sub-ss. 1 and 2, have this effect. It is beyond dispute that by the clearest possible words s. 13, sub-s. 2, does operate to give jurisdiction to the Railway and Canal Commission to take away existing rights of the landowner under existing leases or agreements, and to substitute therefor lesser rights.

Restrictions and conditions which the landowner had imposed on the mineowner may in proper cases be removed and a new grant be ordered freed from the restrictions and conditions, or, in proper cases, a new statutory lease or agreement may be ordered in substitution for the existing one. The jurisdiction given to the Commission is a very wide one, and is plainly one which may result in taking away from the landowner existing rights. When the Act of 1926 is read with, and as an amendment of, the Act of 1923, it seems to me impossible to confine the word " terms " to terms of the lease or agreement other than financial terms. The word in the earlier Act obviously includes financial terms. Such terms may be and frequently are as real and effective an impediment to the mining industry as are terms with regard to the physical acts of mining or carrying away minerals. The argument for the appellants involves the proposition that if the rent of a wayleave was so high as to compel the mineowner as a sensible man of business to give up his mining operations, the Railway and Canal Commission would have no power to revise it, though they would have power to revise other impeding terms that might conceivably have the same effect. I am of opinion that s. 13, sub-s. 2, by clear terms takes away existing rights in personam, subject to such compensation as the incorporation of the provisions of the Act of 1923 gives to the landowner. Those provisions in the Act of 1923 gave power to the Commission to deprive a landlord of his common law right to hold out for the highest rent he could get from the necessities of the mineowner, and only gave him compensation confined to a fair consideration for the compulsory grant. In my judgment, the Act of 1926 has the same effect. The only consideration or compensation provided for the grant of a wayleave is the fair consideration for the grant by a willing grantor to a willing grantee. Any other construction of the Act would have the absurd result of saying that the privileges Parliament was granting with one hand it was taking away with the other. It would constitute an irrational distinction between the statutory position of a landowner who asked for compensation for his right to dictate terms and a landowner who, ex hypothesi, was asking for compensation for the loss of terms which he had been able to dictate.

In my judgment, the word "terms" in s. 13, sub-s. 2, of the Act of 1926 includes, as it does where used in the Act of 1923, financial terms. I also think the financial terms were so burdensome that they constituted an impediment to the getting and carrying away of the coal. The word used in the section is "impede," not "prevent." An impediment is something that hinders, and it does not cease to be an impediment if it can be overcome by special exertions. In the present case the high cost of the wayleave was overcome by carrying on the mines at a loss, but the fact that it was so overcome does not prove that the impediment did not exist.

Though my judgment is differently worded from the judgments of the Railway and Canal Commission, the reasons that have influenced me are implicit in the judgments of the Commission, and I think, if I am not bound by authority to hold otherwise, the appeal should be dismissed.

I now propose to deal with the authorities. I do not think the principles laid down in *Attorney-General* v. *Horner* (1) by Brett M.R. and in other cases cited, are at all applicable to the problem that we have to decide in this case. I am bound to accept the words of Brett M.R. in *Attorney-General* v. *Horner* (1), agreeing as they do with dicta in other cases, that "it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so."

In my judgment, it is impossible to construe s. 13, sub-s. 2, otherwise than as an interference with the landowners' rights, subject only to such compensation as may be gathered from the incorporation in the Act of 1926 of the provisions of the Act of 1923. The order of the Railway and Canal Commission,

(1) 14 Q. B. D. 245, 257.

in my judgment, provided for the only compensation to which the landowner is entitled, by treating the provisions of the Act of 1923 as applying to the substituted rights granted to the mineowner under s. 13, sub-s. 2, of the Act of 1926.

In conclusion, I think there are some valuable observations by Scrutton L.J. and Sargant L.J. in *In re Tilmanstone* (*Kent*) *Collieries, Ld.* (1), which have a bearing on the present case on the question of the construction of the Act of 1926 as well as the Act of 1923. Scrutton L.J. said (2): " In my opinion, the construction which the railway company seek to put on the statute is too narrow. Parliament, in my view, intended that where it was in the national interest that coal should be available for national purposes, and where the operation of rendering the coal available was hampered by the refusal of persons, whose consent before the Act was necessary, to grant proper facilities for the process of making the coal available, the Commission might over-ride that refusal on terms which it considered proper. It was said that this construction might lead to the sanction of hundreds of miles of railway without any of the precautions ordinarily taken by Parliament to protect private interests. In my view Parliament has placed confidence in the judicial tribunal concerned, both to protect individual interests and to over-ride them if it is in the interests of the nation so to do. The judgment of the Court below proceeds on these lines, and I agree with it." Sargant L.J., referring to the argument for the appellants, said (3): " And in addition the whole character of this argument is of a highly technical and narrow character, which is, in my judgment, quite foreign to the spirit and purpose of remedial legislation such as the Act now in question. Such legislation should in general be read broadly, and should not have its obvious purpose cramped and stultified by fine drawn distinctions, and verbal niceties, of this kind." He also said (3): " I agree with Sankey J. in thinking that the phrase ' properly and conveniently worked ' in its ordinary meaning does not exclude elements of cost, especially when applied to such a business as mining, where the whole possibility of profit, and therefore of initiation or continuance, is dependent on a margin—often a narrow one—of receipts over expenditure. . . . . It is probably true that in mining, as in other engineering operations, almost any physical difficulty can be overcome, if expense can be totally disregarded." Further he said (1): " A good deal was said for the appellants as to the dangers of holding the Commission entitled to grant rights which might involve the construction of great lines of railway, and as to the absence of those safeguards which Parliament has imposed on undertakers under the Lands Clauses and Railways Clauses Acts. But in this legislation the powers of the Act are confided to an important judicial tribunal; there is nothing anomalous in the parliamentary grant of an extensive discretion to such a tribunal; and the exercise of the powers of such a tribunal do not need to be safeguarded as in the case of the exercise of powers by private commercial undertakers. It seems to me that the Commission here have taken a sound view of their position and powers under an Act passed to enable them to over-ride private rights, where expedient in the national interest." These observations on the Act of 1923, though not directly in point in the present appeal, afford powerful support of the views above expressed relating to the Act of 1926.

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(1) [1928] 1 K. B. 599.
(2) Ibid. 606.
(3) Ibid. 607.

It was somewhat faintly argued by Mr. Greene on behalf of the appellants that there was no evidence upon which the Commissioners were entitled to find that it was in the national interest that they should make the grant that they did make. I do not think that in deciding what is or is not of national interest the Commissioners are confined to dealing with evidence given before them. They are trusted as a tribunal of experience dealing with matters which are matters of public policy on lines similar to those upon which Parliament would deal with a similar question. They are expressly given wide powers which are not in all respects judicial, and I think it was left to them to decide on general principles whether the grant that they were asked to make for a mining facility was or was not a matter of national importance, and in my judgment they had, quite apart from evidence given in the case, ample material for deciding that it was a matter of national importance that the burdens on a colliery company like the Consett Iron Company should not be so high as to endanger the continuance of their business of producing and bringing coal to market.

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(1) [1928] 1 K. B. 608.

I have so far confined my observations to the question of a grant of a wayleave under s. 13, sub-s. 2, of the Act of 1926. It seems to me unnecessary to decide whether the provisions of the statute are wide enough to enable the Railway and Canal Commission to reduce royalties, but I am inclined to agree with the decision of the Railway and Canal Commission when sitting in Scotland that they are wide enough to have that effect.

One other point was raised by Mr. Bowen on behalf of the Clavering Trustees to the effect that there was no evidence, or at any rate no sufficient evidence, that the Clavering Trustees refused to grant the wayleave, or that they demanded terms which, having regard to the circumstances, were unreasonable, and that accordingly the applicants had failed to comply with the provisions of s. 4, sub-s. 1 (*d*), of the Act of 1923, and the tribunal had no power to consider the case as made against them. In my judgment, it was sufficiently proved that by refusing to accept the terms of 10*l.* per acre put forward by the respondents, the Clavering Trustees had refused to grant it on terms which, having regard to the circumstances, were reasonable. They did not show any willingness to grant it on the terms on which the respondents were entitled to have the grant, i.e., on the basis of what would be fair and reasonable between a willing grantor and a willing grantee, having regard to the conditions subject to which the right is or is to be granted. In my judgment, this point was not entitled to succeed. Mr. Bowen supported his argument on the effect of s. 4, sub-s. 1 (*d*), by reference to *Glassbrook Brothers, Ld.* v. *Leyson.* (1) The actual decision in that case does not help him. The decision was that where a landowner was willing to grant the ancillary right which the

(1) [1933] 2 K. B. 91.

mineowner desired to have on terms which were in substance though not in form the same as those imposed by the decision of the Railway and Canal Commissioners, he could not be said to have demanded terms which, having regard to the circumstances, were unreasonable.

It is true that in giving judgment Lord Hanworth M.R. indicated that the question whether the landowner was demanding unreasonable terms could not be answered merely by saying he demanded terms which were different from those which the tribunal imposed as the fair terms between a willing grantor and a willing grantee, and I think the other Lords Justices agreed with this view; but I do not think the members of the Court intended to intimate that the decision of the Railway and Canal Commissioners as to what was a reasonable rent to fix for a wayleave was not an element to be considered on the question whether something very much less favourable to the grantee having been demanded, such a demand was a demand for terms which, having regard to the circumstances, were unreasonable. If I thought the Lords Justices intended to lay that down as a matter of law, I should be inclined to differ from them; but it is not free from doubt that the observations that I have mentioned were not necessary to the decision of the question which the Lords Justices had to decide in that case.

For these reasons I think the order of the Railway and Canal Commission was right, and ought to be affirmed. That is my view, but the view of my brothers is to the contrary, and their view will prevail.

SLESSER L.J. In this case, the facts of which have been fully stated by Greer L.J., the applicants, the Consett Iron Company, applied to the Railway and Canal Commission for the right to work coal freed from certain terms and conditions which, they said, impeded the working thereof; and, alternatively, applied for ancillary rights to facilitate the working of the coal. The actual applications made were for the right to use and occupy for the purpose of a mineral railway certain strips of land, the property of one or other of the defendants, and the right to use an existing mineral railway freed from the tentale or tonnage rate and other payments now payable, and, as to certain lands, freed from certain rents of 600*l.* payable under the Towneley lease and 150*l.* payable under the Clavering lease upon payment of fixed annual rentals to be assessed by the Commission or such other terms as to the Commission might seem just for a period of ninety-nine years. The application was made under the Mining Industry Act, 1926, or, alternatively, under the Mines (Working Facilities and Support) Act, 1923. In the result, the Railway and Canal Commission acceded to the applications and ordered that " the applicants be granted for the period of ninety-nine years from July 1, 1934, the right to use and occupy for the purpose of a mineral railway the said strips of land and the right to use the said mineral railway for all purposes of and in connection with the operations of the applicants in and about the working, carrying away, treating and converting of coal at or from certain collieries freed from the tentale or tonnage rates and freed from the certain rents reserved to the lessors under their leases and freed from certain conditions with regard to the supply of coal for the consideration of an annual payment calculated at the rate of 10*l.* for every acre in lieu of the obligations under the lease."

The defendants contend, in the first place, that the Railway and Canal Commission Court had no jurisdiction to make such an order, which, they say, is in effect to confiscate without compensation valuable rights of the defendants in the respective leases, and, in the second place, they say that there is no evidence in the case to establish the facts which the Court are bound to find under the statute as a condition precedent to the exercise of their jurisdiction, if they have any.

The first objection of the defendants, that the Railway and Canal Commission Court had no jurisdiction in the matter of the application, which is in substance to reduce wayleave rents fixed under contract, is of very far-reaching public importance. It affects the proprietary rights of all owners of royalties, wayleaves and other similar rights under mining leases, and the appeal is not rendered less serious by the fact that the present decision which is here appealed follows one to the like effect in Scotland, given by the Commission presided over by Lord Blackburn in *Hope-Morley* v. *Carron Co.* (1) decided on December 16, 1930.

It is essential at the outset, if this case is properly to be determined, to be clear as to the exact nature of the right which the applicants here seek to obtain. It is a right claimed to be freed from certain pecuniary conditions in their mining leases and a further right to be allowed to carry away the coal on other pecuniary conditions. The conditions complained of, it is to be observed, relate solely to the amount of the rent which the coalowners have to pay under their leases for the privilege of being allowed to carry away the coal over the lands of the defendants. The applicants do not ask for the removal of any physical restriction in the manner of carrying away the coal, nor for the freeing of the leases from any conditions or the substitution of any other conditions other than the pecuniary condition of liability for rent. This financial condition the Court has by its order modified, and, subject to a variation in the term of the lease, extending it for ninety-nine years, this condition only. The certain and tentale rents formerly payable are both abolished, and the applicants are freed from paying them; the new financial condition inserted in lieu thereof is that the new right of working " shall be at the rate of 10*l.* for every acre."

Whether the statute authorizes it or not, there can be no doubt that by this order the defendants have lost valuable proprietary rights: choses in action. It is true that in the case of the Clavering Trustees there is a right given by clause 31 to the lessees to determine the lease " at the end of any year of the said term "; the lease having been granted for a term of forty-two years from January 1, 1890; but since July, 1932, the applicants have been holding over on the terms of the expired lease. As to the Towneley lease, a new lease was granted on December 30, 1916, containing in clause 32 a similar provision for terminating the lease at the end of any one year by twelve calendar months' notice. This lease is still extant and runs until 1953, if not previously determined. Save for a provision as to the supply of cheap coal in the case of Clavering—on which no point is taken—the principles raised by the two leases are identical, though there is one matter of possible argument in the case of the Clavering Trustees which does not arise in the other case with regard to alleged unreasonable refusal or any refusal of terms.

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(1) Unreported.

I therefore treat these two cases at the outset on the question of jurisdiction as raising the same problem. As I have said, in both the effect of the order is to deprive the landowners of valuable rights. Now, it is elementary that proprietary rights should not be held to be taken away by Parliament without provision for compensation unless the Legislature has so provided in clear terms. This old principle was laid down beyond question in the case of *Attorney-General* v. *Horner* (1) and many other authorities, and was recently affirmed in this Court in a case not dissimilar to the present case in some respects: *West Midlands Joint Electricity Authority* v. *Pitt.* (2) I propose therefore, at the outset, to examine the statute of 1926 and the statute of 1923 with which, by s. 13, sub-s. 6, of the former Act, the latter is to be construed, in order to see whether any such clear terms can there be found, or not. Before embarking on this examination it is right to say that counsel for the respondents contend that if compensation must be given as a result of this legislation, these Acts themselves provide the method and authority for giving such compensation, and that by the order of the Commission such compensation was awarded, being the reduced rental ordered.

Although this application is brought primarily under the Act of 1926, in order that the matter may be considered in proper perspective, it is necessary, first, to consider the earlier statute of which the 1926 Act, Part II., was an amendment. Before the passing of the Mines (Working Facilities and Support) Act, 1923, there was, so far as I know, no power in any tribunal to compel a landowner to allow the minerals in his land to be worked except by his consent and on such terms as he thought

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(1) (1885) 11 App. Cas. 66; affirming 14 Q. B. D. 245.
(2) [1932] 2 K. B. 1.

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fit to agree, and the same observation applies to minerals carried over the land of another. The Act is described in its long title as "An Act to make provisions for facilitating the working of minerals and for imposing restrictions on the working of minerals required for the support of railways, buildings, and works." The first Part, which here more immediately concerns us, deals with the rights of working minerals and rights ancillary thereto and of support. By s. 1, sub-s. 1, it is enacted that: "Where there is danger of minerals being left permanently unworked—(*a*) by reason of the minerals being comprised in or lying under land which is or has been copyhold land, or land subject to a lease exception reservation restriction covenant or condition, or otherwise not being capable of being worked without the concurrence of two or more persons; (*b*) by reason of the minerals being owned in such small parcels that they cannot be properly or conveniently worked by themselves; a right to work the minerals may be conferred in the manner and subject to the provisions hereinafter appearing on any person having an interest in them, or, in the case of minerals owned in small parcels, in minerals adjacent to them, who is desirous of working them either by himself or through his lessees." Sub-s. 2: "For the purposes of this Part of this Act, references to working minerals shall include references to working, carrying away, treating, and converting minerals." And by s. 2: "Where the persons working two adjoining mines have agreed on an adjustment of boundaries between the mines with a view to reducing the amount of minerals to be left unworked between the mines, or to enabling the minerals to be worked more efficiently or more economically, and effect cannot be given to the agreement by reason of the failure or refusal of the lessors of the mines or the owners of the surface, or any of them, to concur, a right to work the minerals in accordance with such adjusted boundaries may be conferred in the manner and subject to the provisions hereinafter appearing on the persons working the mines respectively." Finally, by s. 3, sub-s. 1: "Where any facility, right, or privilege is required in order that minerals may be properly and conveniently worked by the person entitled to work the same, and the proper and efficient working of the minerals is unduly hampered by the inability or failure of that person to obtain such right, facility, or privilege (hereinafter referred to as an ancillary right), such ancillary right may be conferred . . . . on the person having the right to work the minerals who is working or desirous of working them either by himself or through his lessees."

It will be observed that these three sections (save in certain aspects dealing with the adjustment of boundaries) are concerned with the conferring of new rights of working in the circumstances set out in the sections, and not with the modification of existing rights. In such case the right granted at the expense of the other parties is one for which compensation must be paid to the persons whose existing rights are adversely affected by the granting of the new right. This is made clear by s. 6 of the same Act, which provides that: "(1.) Where a matter is so referred to the Commission, the Commission, if satisfied that the requirements of this Part of this Act are complied with in the case of the applicant, and that it is expedient in the national interest that the right applied for should be granted to him, may, by order, grant the right on such terms and subject to such conditions, and for such period, as the Commission may think fit, and upon such an order being made, the right specified in the order shall, subject to the provisions hereinafter contained, vest in the applicant." Sub-s. 2: "Where such a right is granted, such compensation or consideration as in default of agreement may be determined by the Commission shall be paid or given by the applicant in respect of the acquisition of the right to such persons as the Commission may determine to be entitled thereto." Sub-s. 5 is also to be considered in this connection, for it enacts that: "In determining whether any right should be granted or the conditions upon which any such right should be granted the Commission shall have regard to all the circumstances of the case, and in particular to the extent to which the retention of any minerals is required for the protection of any mines or other works from flooding, or for any other mining purpose, and (so far as relevant) to the royalties, covenants, and

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conditions reserved by or contained in the applicant's existing mining lease or leases (if any), or customary in mining leases in the district." The effect of all of which is that where the Commission grants new rights, it must order compensation to be paid; which compensation, in accordance with s. 9, sub-s. 2, must "be assessed by the Commission on the basis of what would be fair and reasonable between a willing grantor and a willing grantee, having regard to the conditions subject to which the right is or is to be granted." Further, by s. 9, sub-s. 1, "the Commission may determine the amount and nature of compensation or consideration to be paid or given and the persons to whom it is to be paid or given, either at the time when they determine whether the right should be granted or the restrictions imposed or at any subsequent time."

I do not think it necessary to consider the converse case mentioned in s. 8 of the Act, which enables the Commission to impose restrictions on working minerals required for support in the interest of the landowner. In such a case, by s. 8, sub-s. 5, if restrictions are imposed as to the quantity or position of the minerals to be worked or otherwise to secure adequate support, the compensation will be payable to the mineowner by the landowner, but the basis laid down in s. 9 applies in both events. So it is clear, without more, that for any right conferred or restriction imposed under the 1923 Act, compensation as between a willing grantor and grantee must be given.

Bearing this in mind, I approach the 1926 Act, Part II., which, as I have said, is an amendment of the Act of 1923. Sect. 13, sub-s. 1, like the Act of 1923, deals with the conferring of new rights of working, but is enlarged to extend to any person who is desirous of searching for or working, either by himself or through a lessee, for coal. In so far as by sub-s. 6 of this section this Part of the Act shall be construed as one with Part I. of the principal Act, and references in that Part of that Act shall include references to any right granted under this Part of this Act, it is clear to my mind that whether the right be granted on the limited grounds stated in the 1923

Act, or on the more general grounds contained in s. 13, sub-s. 1, of the 1926 Act, in either case the right, if given, must be on condition of paying or giving compensation as provided in s. 6, sub-s. 2, and s. 9 of the 1923 Act.

But s. 13, sub-s. 2, of the 1926 Act, which primarily we have to consider, deals with a different subject-matter, for it is dealing with a modification of an existing legal state of affairs. It is concerned with the case where the working of any coal, or where the working of any coal in the most efficient and economical manner, is impeded by any restrictions, terms or conditions in a mining lease, and it provides that the Commission, in proper cases, and, subject to the statutory conditions, may grant a right to work the coal freed wholly or partially from such conditions, or to work the coal on other terms and conditions. It thus gives power to the Commission not only to grant legal rights where none formerly existed, but also to modify existing rights, and the fundamental problem in this case may be simply expressed thus: Whether on a proper construction of s. 13, sub-s. 2, the rights here applied for, which I defined at the outset of my judgment as rights to be relieved of a financial term or condition, are such rights as are contemplated in this sub-section? I have come to the conclusion that they are not for several sufficient reasons: The first, and most important is, that if it be so, either the right which is taken away, that is the right of the landowner to receive the difference in money between that provided under the existing lease and the amount ordered to be paid as reasonable by the Commission, is so taken without compensation or, alternatively, if compensation is to be given, the amount would under ss. 6 and 9 of the 1923 Act be just that amount of which the landowner had been deprived by the order, so that he would receive back as compensation that of which he had been deprived by the Court. On the first head, I cannot see, when the two Acts are read together, if all other rights conferred are to be the subject of compensation, why the right to be freed from the contractual obligation to pay a rent higher than the applicant desires is not itself a right which should be the subject of compensation. If, instead of a money payment, of which the applicant is to be relieved, he were to be relieved of some other restriction, such, for example, as an obligation to pull his trucks by horses and not by engines, it is to my mind unarguable that the loss in amenity and value which the landowner might be compelled to suffer to his manor house by no longer being able to prevent noisy trains from passing near his residence, would be a right given to the mineowner for which the landowner might claim compensation, and if for all rights granted to the mineowner which operate by way of freeing him from restrictions and conditions, other than the condition of the payment of rent, he must pay compensation, I can see no reason why the same obligation to pay ought not to apply in the case of payment of rent as in all other cases under sub-s. 2. But if the compensation is to be paid and the sum awarded on amounts equivalent to the rent, the burden of which has been taken away from the mineowner, the result is a contradiction, and it is a more rational construction to come to the conclusion, in order to avoid this inevitable absurdity, that the Legislature never intended sub-s. 2 to apply to the relief of financial obligations of such a kind at all.

This view is fortified by other considerations. The sub-section speaks of the working of any coal or of the working of any coal in the most efficient and economical manner being impeded by restrictions, terms or conditions contained in a mining lease. The word " manner " which is to be the subject of the impediment points very much in favour of the impediment of a restrictive method in the process of working or carrying away the coal ; something in the nature of a physical and not a financial impediment. Again, the power to grant a right to work the coal " freed wholly from conditions or restrictions " which the Commissioners are given under s. 13, sub-s. 2, of the 1926 Act, if it applies to rent, means that the Commissioners may wholly abolish the condition of rent altogether, which would destroy the substratum of the lease. For the word " condition " seems to me equally with the word " term " to cover the case of rent.

Yet another reason against the respondents is to be found in the word "impediment" in the context in which we find it. The question whether there was in this case proved any impediment in the working of the coal by the high rental occupied a large part of the argument; but if the view be taken, which I think to be the right one, that the impediment here intended is not a financial impediment to the conduct of the coal business, but an impediment to the process of winning or carrying away coal, the problem does not arise. It is in any event difficult to see what sort of impediment caused by an increase in expense in the working of the business could properly be said to be an impediment in the working of the coal in the most efficient and economical manner, unless indeed all expenses imposed by all royalties and wayleaves are to be considered impediments, a view for which the Act provides no justification.

Indeed, the continuance of royalties is expressly assumed in s. 6, sub-s. 5, of the 1923 Act, in Part II. of that Act, and in Part III. of the Act of 1926. The titles of the 1923 Act "Mines (Working Facilities and Support) Act," and the heading of Part II. of the Mining Industry Act, 1926, "Working Facilities," at which one may look in case of ambiguity, are singularly unsuitable to describe what is said by the respondents here to be done. I do not discuss the observations of the Lords Justices in *Tilmanstone's* case (1) to the effect that under the 1923 Act the Commission is entitled to take into account economic conditions which militate against the effective marketing in considering whether it is in the national interest to grant ancillary rights to facilitate the proper and efficient working of minerals, because the problem there raised was an entirely different one, concerned with the question whether an effective alternative method of working had or had not been offered; there, in the language of Greer L.J., the tribunal was entitled to take into account the costs which it is necessary to incur in the absence of facilities which the mineowner asked for. Such observations in such a context seem to me to have no relation to, and are of little assistance

(1) [1928] 1 K. B. 599.

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in solving, the difficulties now before us; they are dealing with a much more limited question.

Sir Francis Taylor in his judgment in the present case points out that: "If it is asked how is the loss to the lessor to be recouped, the statute appears to be silent as to this"; and respectfully I agree, but that very consideration strengthens my view that the incapacity of the statute to deal with compensation for confiscated rights, unless it be indeed to produce the absurdity I have touched upon by giving back with one hand what is taken by the other, brings me to the conclusion that the terms or conditions, whichever they be called in s. 13, sub-s. 2, do not include the release from the financial obligation to pay rent agreed upon in a lease or contract or confer a right upon the coalowner to pay a lower rent to the landowner in breach of his contractual obligation for the same facilities for no consideration.

I have yet to deal with the alternative contention that, if compensation is to be paid, such compensation is here found in the lower rentals awarded by the Commission. Such an argument, once it is remembered that the right taken away is the difference between the contracted rental and the lower rental ordered, must appear fallacious; but it is interesting to observe that, when the Legislature was dealing with compensation under s. 9, sub-s. 2, of the 1923 Act, it stated in terms that the compensation should be assessed "having regard to the conditions subject to which the right is or is to be granted." Such conditions in the present case would be the lower rentals, and, therefore, it is clear that as the condition has to be taken into account in computing the compensation, it cannot itself be the compensation awarded. The impeached order destroys a vested right and creates a new one, the vested right being to receive the whole rental, the new one to receive the rental ordered. For the loss of the former no compensation at all is given.

For these reasons, I have come to the conclusion that the judgment in the Court below, and the judgment in *Hope-Morley* v. *Carron Co.* (1), cannot be supported; that the

(1) Unreported.

application was misconceived, and that, if it is desired to give power to the Commission to reduce or vary rents paid for royalties or wayleaves, that power must be sought in further legislation. I think that the Commission acted without jurisdiction, and that consequently the order made by them is inoperative and that the appeal succeeds.

I have said nothing about the difficult question raised by the fact that the Commission have thought fit to extend the period of years of the lease by their order. It is not very easy, to my mind, in any event, to think that a power to free an applicant from the obligations of an existing lease can extend to enable the Commission to do more than release him for the period of that lease or substitute other terms during the period for which the lease would have operated ; nor can I think that the applicants could now make a proleptic claim to operate after the expiration of the lease and fall back upon the 1923 Act and claim in advance, before the lease had expired, that after the expiration of the Towneley lease or after the mineowners had ceased to hold over under the Clavering lease, he should now be given prospectively a new right to wayleave. It may be that when the lease expired he could then make another application under the 1923 Act for a new right to carry away which would no longer depend on existing agreement, in a situation where no vested rights would exist which could be disturbed; but, as in my view the whole subject-matter of this application was incompetent, the problem does not immediately arise, and I express no decided opinion upon it.

The conclusion that the Court lacked jurisdiction makes it unnecessary for me to consider whether, if it had it, the evidence in this case was sufficient to satisfy the requirements of the statute—namely, a finding that these high rentals impeded the working of the coal or the working of the coal in its most efficient and economical manner, nor do I discuss the question of unreasonable refusal or national interest; but, as I have said, the difficulty of envisaging any class of financial impediments which of themselves would impede the manner of working coal fortifies the view of the construction of the statute as a whole which I have been led to take.

I need hardly say that it is with diffidence that I feel myself constrained to come to a conclusion on so important a matter other than that at which Greer L.J. and the learned and experienced Commissioners have arrived both in England and Scotland, but I find some support for the opinion at which I have arrived in the principles underlying the judgments in the recent case in this Court of *West Midlands Joint Electricity Authority* v. *Pitt.* (1)

As Roche L.J. is of the same opinion these appeals will be allowed, with costs of the appeal.

ROCHE L.J. This appeal raises a question of first importance, not only to the immediate parties whose financial relations are most radically altered by the orders under appeal, but to all mining lessors and lessees who have entered into agreements under which mining royalties or payments for ancillary rights such as wayleaves are provided for.

The question is obviously one of great nicety and difficulty and I differ with hesitation and reluctance from the decisions of the Commissioners sitting in both England and Scotland, supported as they are by the weighty opinion of Greer L.J.; but having arrived at a clear opinion that those decisions are erroneous, I concur with Slesser L.J. in the conclusion that these appeals should be allowed.

The Lords Justices who have given judgment have set out so fully the material facts and the relevant sections of the Acts which fall to be considered, that it is unnecessary that I should do more than state, without repetition of such recitals, my conclusions and my reasons for such conclusions. In so doing, I shall use the term "lessees" to describe the applicants and those in a like position, and the word "lessors" to describe the respondents to the applications and the appellants in this Court. There is no difference in principle or result whether the subject-matter of the lease is the right to get coal under royalty or to carry coal under wayleave rents.

Two main points were argued at the hearing of the appeals:

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(1) [1932] 2 K. B. 1.

first, Was the reduction of the rents to be paid by the lessees with or without compensation a matter within the competence of the Commissioners? Second: Was there any evidence justifying or supporting a finding that these particular rents could be and should be reviewed and made the subject of orders? Slesser L.J. does not think it necessary to decide the second point; but as this point clearly arises on the facts in the present cases and on the hearing of the appeals was the subject of much argument at the Bar, I think it right to express my opinion upon it. I can find here no such evidence, and on that ground alone I think the appeals should succeed. I will return to this second point after discussing the question of construction arising on the first point; but the state of facts giving rise to the second point may, I think, usefully now be stated.

There is no finding in any of the judgments of the three Commissioners that the lessees here suffered any slowing down of their work or any diminution in output or in the amount of coal carried away owing to the terms of the leases brought under review. On the contrary, the only reference to the matter is in the opposite sense and appears in the judgment of Sir Francis Taylor, who says, in connection with another topic, that of national interest, as follows: "I keep before my mind that if an order is made now in favour of the grantee in this case, not one ton more of coal will now pass along the wayleave, that in spite of the charge the number of tons passing may have increased, that if the charge remains effective the three collieries will not immediately close down, and that at the moment the result will be to help the financial position of the applicants."

Mr. George, the principal witness for the lessees, put the matter clearly and candidly in a way that may, I think, fairly be summarized as follows: During the period whilst the rents under review were being paid, the Consett Iron Company had at times made large profits and paid large dividends. At the present time and for some years the trade position had been very different, and the Consett Iron Company, in common with the Durham coalowners in general, was selling export coal at a loss and was in a difficult, though somewhat improving, financial position. The difference between the views of the lessors and lessees in recent negotiations represented a difference of about 1·65*d.* per ton in the cost of coal f.o.b. Derwenthaugh, which cost was estimated at about 11*s.* 7*d.* per ton. The reduction claimed from the Commission and eventually granted by it would represent 5000*l.* a year to the company, and such sum of 5000*l.* a year would not lead to more coal being carried, but would be a welcome addition to the financial resources of this company.

One other fact which emerged was that the cost of carriage over this private railway with the existing rents was less and not more than the cost would have been if it had been a public railway and ordinary railway rates had been payable on the coal.

I will discuss later the effect, as I see it, of such a state of facts, and will now pass on to deal with the matters of construction raised by the first point. In my judgment, s. 13, sub-s. 2, of the Act of 1926 does not include within its ambit jurisdiction to review or alter, without compensation or at all, royalties and rents. My reasons for this conclusion are as follows: the language of the section itself seems to me, for the reasons discussed more at length by Slesser L.J., to be inapt and insufficient to confer any such jurisdiction. The section seems to deal exclusively with impediments or obstructions to the actual working or carrying away of minerals. The relief of financial burdens is not expressly mentioned and seems to me to be a different subject-matter, which, having regard to its importance and universal application, cannot properly be held to be brought thus incidentally, and almost casually, within the operation of this section.

The argument for the lessees lacked nothing in breadth and thoroughness. It was that an impediment was the same as an obstacle, that any and all royalties and rents were impediments and obstacles to working minerals, that they might be surmounted without stoppage or slowing down of work, but they still constituted obstacles. It was said that of course before relief was given, the effect on the lessees and their work would fall to be considered; but as regards jurisdiction to free lessees wholly or in part from rents and royalties, it existed and could be exercised whenever a royalty or rent had to be paid for winning or carrying coal. In my opinion, this argument strains the language of the section far beyond its natural meaning. An illustration was given by Mr. Wrottesley, in his able argument for the lessees, of hurdles in a hurdles race, which, he said, are impediments or obstacles although surmounted. Analogies cannot be pressed too far, but I venture to think that the hurdles in such a case could not properly be described as impediments to the running of the race, though they are obstacles to be surmounted for the essential purposes of the race, and that similarly, agreed rents and royalties which have to paid before or after work is done, cannot properly be described as impediments to working, or even to economical working.

Next, the titles of the two Acts in question and the provisions of their sections other than s. 13, sub-s. 2, seem to me to point away from the adoption of the lessees' contentions. The titles, so far as material, relate to working facilities, a very different subject-matter, as it seems to me, from relief from financial obligations or burdens. As to other sections, I only think it necessary to refer to a few provisions as instances. Sect. 6, sub-ss. 1 and 2, of the Act of 1923 seem to treat "terms" and "conditions" as not including financial terms, inasmuch as compensation or consideration is to be dealt with under sub-s. 2 in a different manner from terms and conditions which fall to be dealt with under sub-s. 1. Sub-s. 5 of the same section specifically refers to existing royalties as matters to which regard is to be had, and therefore it would seem to me to be odd if, where royalties are to be reviewed in the sense contended for under s. 13, sub-s. 2, no reference to so important a matter should be made. So also in Part II. of the Act of 1923, dealing with minerals under railways, which has otherwise no bearing on the present point, it is very noticeable how expressly and precisely the matter of royalties is dealt with in section after section of that Part of that Act. A similar observation may be made as to Part III. of the Act of 1926 and the Schedule, which would seem, so far from treating royalties and rents as matters uncertain or precarious (as they would be if the decisions under appeal are right), to treat them as a firm basis not only for Mineral Rights Duty, but for an essential part of the finance of the Welfare Fund.

The incidence of death duties on such royalties and rents was proved in one of the cases under appeal in connection with one of the topics considered by the Commission, and such incidence is, of course, general and highly important to the Crown as well as to the subject, and would be very materially affected by a provision permitting or authorizing a general revision of all royalties and rents. A provision thus affecting the Crown might, of course, be enacted, but it seems to me to be expected and required that it should be enacted in plain and unambiguous terms.

The last, and probably the most important, matter bearing on the point under consideration is the curious position as to compensation if effect is to be given to the lessees' contentions. The Acts seem to me to be plain as to the right to compensation. It is equally plain that under the judgments of the Commissioners no compensation is to be paid by the lessees for the right to work freed from the previously existing financial stipulations regulating the rights of the parties. It is said that to give it would be absurd and that it cannot have been intended that it should be given, since it would be taking away money in one form merely to give it back in another form.

The inference I think myself entitled to draw is not that compensation should for that reason be withheld, but that matters which could not properly be the subject of compensation, such as these, are not within the ambit of the Act at all. With what may properly be described as conditions of work and restrictions on work, it would often and perhaps generally be the case that the freedom to be granted to lessees would be worth much more in money to them than the consequent money loss to the lessors, and consequently compensation would provide an adequate and satisfactory adjustment between the parties. In the present cases it would be otherwise, and leave them much where they started from; but if the Act can be invoked, as I think it cannot, for the present purpose, I see no language sufficient to deprive the lessors of a right to compensation. The principles of law as to this matter are well established and are referred to and recognized in the authorities mentioned by Slesser L.J. in his judgment.

I therefore hold that s. 13, sub-s. 2, of the Act of 1926 does not enable the Commissioners to do what they have done by the orders under appeal.

I return to the second point—namely, whether there are facts in evidence justifying the orders of the Commissioners. Slesser L.J. rightly observes that if the revision of royalties and rents is not within the competence of the Commissioners under s. 13, sub-s. 2, this question does not arise; but as the point forms a different and alternative objection to the particular orders under consideration, I think it right, as far as I am concerned, to give a decision upon it. If the broad contention of the lessees is correct that all royalties and rents are necessarily impediments within the meaning of the section, then there is no need of evidence; but, in my opinion, for the reasons I have already given, it is incorrect.

For this purpose be it assumed that financial stipulations for royalties or rents are, contrary to my opinion, within the purview of the section and can be revised by the Commissioners. Nevertheless, I am of opinion that, before relief can be given, impediment in fact must be proved. The weight of the evidence is for the Commissioners, and is not a matter of law for this Court; but here there was, as I stated at an early stage of this judgment, no finding at all, nor any evidence, of stoppage or retardation of work. I have referred to Sir Francis Taylor's statement on the subject, and to that may be added that it was shown by tables put in at the hearing, that the traffic carried over the lessors' land had been over a series of years mounting in volume. In quite recent years the part of the line belonging to the Clavering Trustees, amongst other parts, had been utilized to a large extent for a new inwards traffic to coke ovens of the lessees installed in the year 1928.

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I am therefore of opinion that on this second and alternative ground the appellant lessors are entitled to succeed in their appeals. I think it unnecessary to express any opinion upon the independent point made by counsel for the Clavering Trustees, referred to by Greer L.J. in his judgment, or upon the appellants' argument raising certain objections to the Commissioners' findings on the subject of national interest.

Appeal allowed.

Solicitors for Towneley Trustees: *Bircham & Co.*

Solicitors for Clavering Trustees: *King, Wigg & Brightman, for Clayton & Gibson, Newcastle-upon-Tyne.*

Solicitors for applicants: *Gregory, Rowcliffe & Co., for Cooper & Jackson, Newcastle-upon-Tyne.*

J. S. H.

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WESSEX DAIRIES LIMITED *v.* SMITH.

[1934. W. 1863.]

Master and Servant—Implied duty of servant to serve with fidelity—Servant asking master's customers to transfer custom to himself after termination of his service.

A servant who, while still in the service of his master, solicits the customers of his master to transfer their custom to himself, even though that transfer is to take effect only after the service has terminated, commits a breach of his duty to his master, and for that breach he is liable in damages.

Nichol v. *Martyn* (1799) 2 Esp. 732 disapproved.

APPEAL from Humphreys J.

The plaintiffs, who carried on business as dairymen and milksellers, were the assignees and successors of one Garland, whose service the defendant entered in 1922 under an agreement by which in consideration of a weekly wage he agreed that he would well and faithfully serve Garland and his assigns or successors and would not during the continuance of, nor after quitting, the service interfere with the trade or the customers served by Garland or his assigns or successors, and if he failed to observe these covenants he would pay twenty shillings for each day's breach as liquidated damages. The defendant was in the service of Garland till 1933, and thereafter was in the service of the plaintiffs until the evening of June 2, 1934, when he terminated his service by giving to the plaintiffs one week's salary in lieu of notice.

The plaintiffs alleged, and the judge found, that on the last day of his service with the plaintiffs he asked a number of their customers to transfer their custom to him as from the following day, when he was to begin business on his own account, and this a number of them did. This, the plaintiffs alleged, was a breach of his express agreement, or, alternatively, a breach of his implied obligation to serve them with fidelity, and in respect of this breach they claimed damages.

Humphreys J. held that the defendant, during his service with the plaintiffs, acted in a way which was contrary to their interests, and was not a faithful servant to his masters in that he was obtaining orders for himself and obtaining and transferring to himself a portion of the goodwill of the plaintiffs' business. Accordingly the plaintiffs were entitled to damages, and these he assessed at 20*l*., for which he gave judgment in the plaintiffs' favour.

The defendant appealed. (1)

Scott Henderson for the appellant. This case is covered, and in the appellant's favour, by Lord Kenyon's decision in *Nichol* v. *Martyn* (2), the sidenote to which reads thus: "A servant, while in his master's service, may solicit business from his customers for himself, when his service is at an end, and he sets up on his own account,"—a proposition which is fully borne out by the language of Lord Kenyon when he pointed out that "the defendant did not solicit the present orders of the customers; on the contrary, he took for the plaintiffs all those he could obtain : his request of business for himself was prospective, and for a time when the relation of master and servant between him and the plaintiffs would be at an end." It is true that in one passage of his judgment in *Robb* v. *Green* (1) Hawkins J. (2) said that he could not help asking himself "whether at the present day Lord Kenyon, after considering the matter, would have considered it no breach of the duty of a servant deliberately to utilise his hours of service by being false to his master's interests and endeavouring to induce his master's customers to transfer their custom to him on a near approaching day." But Hawkins J. could not overrule the decision in *Nichol* v. *Martyn* (3), and moreover in a later part of his own judgment he said this (4) : "In what I have said I do not intend to convey that while the contract of service exists a person intending to enter into business for himself may not do anything by way of preparation, provided only that he does not, when serving his master, fraudulently undermine him by breaking the confidence reposed in him. For instance, he may legitimately canvass, issue his circulars, have his place of business in readiness, hire his servants, etc. Each case must depend on its own circumstances." In that case the defendant secretly copied from his master's order-book a list of the names and addresses of the customers, intending to use the same after he left the plaintiff's service and when he had set up a similar business on his own account. Hawkins J. and the Court of Appeal (5) held that he could not be allowed to do that. The facts in this case are very different. *Nichol* v. *Martyn* (3) was not referred to in the Court of Appeal in *Robb* v. *Green* (5) nor does it appear ever to have been judicially doubted.

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(1) There was also a cross-appeal by the plaintiffs as to the amount of damages, which was dismissed, but this does not call for a report.

(2) 2 Esp. 732.

Done for the respondents. Humphreys J. rightly held that the defendant had committed a breach of the obligation resting upon him to serve the plaintiffs with fidelity in that while still in the plaintiff's service he solicited the plaintiffs' customers to transfer their custom to him. The fact that the solicitation was only made prospectively does not affect the question. What he did was to obtain during his masters' time customers for himself. As Bowen L.J. said in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1): "An agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master." In this case the appellant while in the respondents' service obtained by his solicitation a part of the respondents' goodwill; that was a wrong committed against them.

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(1) [1895] 2 Q. B. 1.
(2) Ibid. 14.
(3) 2 Esp. 732.
(4) [1895] 2 Q. B. 15.
(5) [1895] 2 Q. B. 315.

Scott Henderson replied.

GREER L.J. In this case the plaintiffs were the proprietors of a dairy in whose service the defendant had been for some time as a roundsman, as he had been with their predecessor in the business. By an agreement between that predecessor and the defendant the latter undertook that in consideration of his weekly wage he would "well and faithfully serve" him "or his future . . . . assigns or successors in the same business and will not during the continuance of such service nor after quitting such service in any way interfere with the trade or the customers served by and from the dairy aforesaid, or endeavour in any way whatever to supply any of the said customers either as servant or master for his own benefit or that of any other person or persons whatsoever." If that was a valid contract the defendant would not only have been prevented from trading on his own account with customers on the round while in the plaintiffs' employment but would have been prevented from doing so after he left their service, and, apparently, for the term of his natural life. It was conceded that the effect of the decision in *Attwood* v. *Lamont* (2) is to make such a contract, in so far as it restrained the defendant, after he left the plaintiffs' employment, from canvassing the plaintiffs' customers, invalid. The case before the judge was conducted upon that view, and I do not propose to consider whether the

(1) (1888) 39 Ch. D. 339, 363. (2) [1920] 3 K. B. 571.

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decision in *Attwood* v. *Lamont* (1) goes as far as that. I proceed upon the assumption that the clause which I have read, in so far as it restricts the defendant after he left the plaintiffs' service, is invalid; but I treat the obligation that during the employment he will faithfully serve the plaintiffs as binding upon him. Even, however, if the latter obligation is not severable and the whole undertaking is bad from beginning to end, the defendant would nevertheless be under the ordinary implied obligation existing between master and servant—namely, that during the continuance of his employment he will act in his employers' interests and not use the time for which he is paid by the employers in furthering his own interests. Mr. Scott Henderson on behalf of the defendant has asked us to say that that is not so, and he cited in support of his contention *Nichol* v. *Martyn* (2), which is to be found in that collection of imperfect and misleading reports bearing the name of Espinasse, and of which the sidenote reads thus: "A servant, while in his master's service, may solicit business from his customers for himself, when his service is at an end, and he sets up on his own account." If that is to be taken as laying down a general principle applicable to all contracts of service it is in my opinion bad law and cannot be accepted at the present day. During the subsistence of the contract of service and during his master's time the servant has to look after, not his own interests, but those of his master. The report of *Nichol* v. *Martyn* (2) is very short, but if the words of Lord Kenyon are correctly reported they lay it down that a servant may, while in the master's service, canvass or solicit business from the master's customers for himself to take effect after he has left the service. In that case the defendant was a traveller in the service of the plaintiffs, but it does not appear whether he was entirely in their employment, and it may be that if we knew the precise facts the actual decision might be justified without accepting the general principle stated by Lord Kenyon as applicable to all master and servant contracts. The point involved came before the Court in *Robb* v. *Green* (3),

(1) [1920] 3 K. B. 571.
(2) 2 Esp. 732.
(3) [1895] 2 Q. B. 1, 14.

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where Hawkins J., in the course of a very elaborate and illuminating judgment, said this with regard to *Nichol* v. *Martyn* (1): "It seems presumptuous to criticise or doubt so high an authority, but I cannot help asking myself whether at the present day Lord Kenyon, after considering the matter, would have considered it no breach of the duty of a servant deliberately to utilise his hours of service by being false to his master's interests and endeavouring to induce his master's customers to transfer their custom to him on a near approaching day. It was certainly against his master's interests that he should do so. It may be under particular circumstances that the injury done to his master would hardly be greater than if he had waited till he had left the service before he made his canvass. But that is not the question. The obligation to protect his master's interests lasts until the last hour of his service. The dividing line between owing his master a duty and owing him none is that imperceptible period of time between the termination of his service and the moment he acquires freedom of action after his service has terminated." Hawkins J. then dealt with the facts in the case before him, which were that, during the service, the servant copied a list of the master's customers. That was clearly a flagrant breach of trust. The passage I have read correctly states the duty owed by a servant to his master as the law regards it at the present day.

In this case the defendant acted contrary to his duty. During the last week of his service with the plaintiffs, while pursuing his duty by calling on customers and delivering milk to them, he tried to induce them to become his customers after his employment with the plaintiffs was terminated, and for the direct result of that wrongful act he is liable to pay damages. The appeal must be dismissed.

MAUGHAM L.J. The claim in this case, which raises a question of some interest in relation to the duty of a servant to his master during the period of his employment, is based upon an alleged breach of an implied term in the contract by which the defendant was to serve the plaintiffs as a milk roundsman. The point of law involved is one upon which judges have not always expressed the same opinion. The question is whether a servant in such an employment as that in which the defendant was engaged, is entitled, while in that employment, to solicit orders from the plaintiffs' customers as from a future time—namely, the time when the defendant ceased to be in the employment of the plaintiffs. Humphreys J. found that the defendant committed a breach of contract and awarded the plaintiffs 20*l.* as damages. In this Court the defendant's counsel has relied on some passages in *Nichol* v. *Martyn* (1) as justifying the defendant's conduct —passages which to some extent seem to have been approved by Hawkins J. in *Robb* v. *Green.* (2) This Court has now to decide whether the language of Lord Kenyon as reported can be accepted at the present day as accurately stating the law, and whether the words used by Hawkins J. which seem to agree with it are correct. *Nichol* v. *Martyn* (1) was a decision at nisi prius. The plaintiffs in that case were wholesale ironmongers by whom the defendant was employed as their traveller to get orders. During his employment with the plaintiffs the defendant solicited their customers to give their orders to him after he had left their employment. In his judgment Lord Kenyon C.J. said : " A servant while engaged in the service of his master, has no right to do any act which may injure his trade, or undermine his business ; but every one has a right, if he can, to better his situation in the world ; and if he does it by means not contrary to law, though the master may be eventually injured, it is damnum absque injuria." Then comes this passage : " There is nothing morally bad, or very improper in a servant, who has it in contemplation at a future period to set up for himself, to endeavour to conciliate the regard of his master's customers, and to recommend himself to them, so as to procure some business from them as well as others. In the present case, the defendant did not solicit the present orders of the customers ; on the contrary, he took for the plaintiffs all those he could obtain :

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(1) 2 Esp. 732.

(1) 2 Esp. 732.

(2) [1895] 2 Q. B. 1.

his request of business for himself was prospective, and for a time when the relation of master and servant between him and the plaintiffs would be at an end." Lord Kenyon accordingly non-suited the plaintiffs. The case, it may be noted, was argued by very eminent counsel, who no doubt put forward every point adequately; but having regard to the fact that the skill and accuracy of Espinasse as a reporter have been often adversely criticized (indeed at one time counsel were recommended by judges not to cite him, inasmuch as he afforded no sure guidance), I cannot think that the report in this particular can be accurate. I doubt whether Lord Kenyon used the words I have cited, beginning "There is nothing morally bad." They do not sound like a judgment of his. If what the servant was doing was morally bad it was improper, and if improper it was morally bad. I doubt also whether we can accept the view attributed to the Chief Justice that a person while still in the employment of wholesale ironmongers is entitled to solicit customers for himself as from the time when he ceases to be employed by them. In *Robb* v. *Green* (1), however, Hawkins J. said this (2): "In what I have said I do not intend to convey that while the contract of service exists a person intending to enter into business for himself may not do anything by way of preparation, provided only that he does not, when serving his master, fraudulently undermine him by breaking the confidence reposed in him. For instance, he may legitimately canvass, issue his circulars, have his place of business in readiness, hire his servants, etc. Each case must depend on its own circumstances." I do not know what the judge meant by "legitimately canvassing," but if he meant that the servant while going his rounds or while he was employed in some way on behalf of the master is entitled to use the opportunity to canvass his customers for himself as from the day when he ceases to be in the master's service, I doubt whether that view is correct, and I observe that when that case went to the Court of Appeal (3) nothing to that effect is to be found in the judgments.

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(1) [1895] 2 Q. B. 1.
(2) Ibid. 15.
(3) [1895] 2 Q. B. 315.

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There is, however, another passage in *Robb* v. *Green* (1) when Hawkins J. in referring to the judgment of Lord Kenyon in *Nichol* v. *Martyn* (2), said this: " It seems presumptuous to criticise or doubt so high an authority, but I cannot help asking myself whether at the present day Lord Kenyon, after considering the matter, would have considered it no breach of the duty of a servant deliberately to utilise his hours of service by being false to his master's interests and endeavouring to induce his master's customers to transfer their custom to him on a near approaching day." That appears to show that Hawkins J. did not take the view, which the other passage I read seems to indicate, that a servant can properly canvass his master's customers for himself as from a near approaching day. The question to be determined essentially depends upon the term to be implied in the ordinary case of a contract of employment in the absence of express agreement. In the present case an express agreement has been mentioned which states the duty of fidelity, but I should like to decide the case on a wider ground. Hawkins J. said in *Robb* v. *Green* (3) that in a contract of service, and in the absence of any stipulation to the contrary, there is an implied obligation that the servant will honestly and faithfully serve his master; that he will not abuse his confidence in matters appertaining to his service; and that he will, " by all reasonable means in his power, protect his master's interests in respect to matters confided to him in the course of his service." This is somewhat vague; I do not quite know what is meant by the words " matters confided to him." For myself I prefer the more general implication stated thus by A. L. Smith L.J. (4): " I think that it is a necessary implication which must be engrafted on such a contract that the servant undertakes to serve his master with good faith and fidelity. That is what was said in the case of *Lamb* v. *Evans* (5), and I entirely agree with it." The Lord Justice then asked himself whether the defendant in *Robb* v. *Green* (6) acted with good faith and

(1) [1895] 2 Q. B. 1, 14.
(2) 2 Esp. 732.
(3) [1895] 2 Q. B. 10.
(4) [1895] 2 Q. B. 320.
(5) [1893] 1 Ch. 218.
(6) [1895] 2 Q. B. 1, 315, 320.

fidelity. The same question has to be answered in the present case. In dealing with it certain considerations should not be left out of sight. First, after the employment terminates, the servant may, in the absence of special stipulation, canvass the customers of the late employer, and further he may send a circular to every customer. On the other hand, it has been held that while the servant is in the employment of the master he is not justified in making a list of the master's customers, and he can be restrained, as he was in *Robb* v. *Green* (1), from making such a list, or if he has made one, he will be ordered to give it up. But it is to be noted that in *Robb* v. *Green* (1) the defendant was not restrained from sending out circulars to customers whose names he could remember. Another thing to be borne in mind is that although the servant is not entitled to make use of information which he has obtained in confidence in his master's service he is entitled to make use of the knowledge and skill which he acquired while in that service, including knowledge and skill directly obtained from the master in teaching him his business. It follows, in my opinion, that the servant may, while in the employment of the master, be as agreeable, attentive and skilful as it is in his power to be to others with the ultimate view of obtaining the benefit of the customers' friendly feelings when he calls upon them if and when he sets up business for himself. That is, of course, where there is no valid restrictive clause preventing him doing so.

In this case the question is whether the defendant acted with fidelity when, on the Saturday afternoon in question and perhaps on the previous days of the week, in going his round he informed the customers that he would cease on Saturday to be in the employment of the plaintiffs, that he was going to set up business for himself, and would be in a position to supply them with milk. He was plainly soliciting their custom as from Saturday evening. In my opinion that was a deliberate as it was a successful canvassing at a time when the defendant was under an obligation to serve the plaintiffs with fidelity. I am of opinion therefore that he committed

(1) [1895] 2 Q. B. 1, 315, 320.

a breach of his implied contract by acting as he did before the termination of his employment. Not to leave the matter in doubt I must add that the passage in Lord Kenyon's judgment relied on by counsel for the appellant cannot in my opinion be regarded as good law.

TALBOT J. I am of the same opinion, and I desire to add nothing except that I agree that *Nichol* v. *Martyn* (1) as reported cannot be relied upon as a correct statement of the law.

Appeal dismissed.

Solicitors for appellant: *J. F. Chadwick, for Edmonds & Bullin, Portsmouth.*

Solicitors for respondents: *Reynolds, Sons & Gorst.*

J. S. H.

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March 4, 5.

THOMPSON *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

Workmen's Compensation—Accident—Compensation paid on basis of partial incapacity—Second accident resulting in total incapacity—Whether total liability of employer to pay compensation can exceed 30*s. a week—Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1; *s.* 9, *sub-s.* 1 (*c*).

By s. 9, sub-s. 1, of the Workmen's Compensation Act, 1925: "The compensation under this Act where total or partial incapacity for work results from the injury shall be a weekly payment during the incapacity of an amount calculated in accordance with the rules hereinafter contained: Provided that . . . . (*c*) the weekly payment shall in no case exceed thirty shillings."

A workman who had been partially incapacitated by an accident and was in receipt of 19*s.* 6*d.* a week compensation, was, whilst in the employment of the same employers, totally incapacitated for two months by a second accident in respect of which the compensation, calculated according to the Workmen's Compensation Act, 1925, was 22*s.* 6*d.* a week:—

Held, that there was nothing in the Act of 1925 which restricted the total liability of the employers for compensation in respect of the two accidents to the 30*s.* mentioned in proviso (*c*) to sub-s. 1 of s. 9 of the Act; that that proviso was confined to the weekly payment in respect of the particular accident then under consideration; and that the workman was therefore entitled to the two sums of 19*s.* 6*d.* and 22*s.* 6*d*

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(1) 2 Esp. 732.

Hodgson v. *Owners of West Stanley Colliery* [1910] A. C. 229 and *Harwood* v. *Wyken Colliery Co.* [1913] 2 K. B. 158 applied.

Dictum of Lord Dundas in *M'Kinstrey* v. *Auchinlea Coal Co.* 1920 S. C. 75 that incapacity under the Workmen's Compensation Acts was one and indivisible and could never be more than total incapacity however many injuries by accident the workman might suffer from, dissented from.

APPEAL from an award of the judge of the Darlington County Court sitting as arbitrator under the Workmen's Compensation Acts.

The following statement of facts is taken from the judgment of Lord Hanworth: "The applicant, Mr. Thompson, was in 1921 in the employ of the London and North Eastern Railway as a smelter, and he was earning good wages—namely, 4*l.* 4*s.* 9*d.* a week. Unfortunately, on January 7 of that year he met with an accident by which he sustained an injury to his finger which disabled him totally for a period, and he was paid the proper amount of compensation down to April 29 of that year. Although mutilated, perhaps one can happily say, in a minor degree—it was not an injury such as involved the amputation of a leg or an arm, but still it was an injury—the result of it was that he was not able to earn such good wages as he had previously done as a smelter. The railway company took him back into their employ, and he was employed as a labourer, but his wages were then 40*s.* 4*d.* a week. Inasmuch, however, as his earning capacity had been reduced from the days when he was a smelter earning 4*l.* 4*s.* 9*d.* a week, he was entitled to and was paid by the railway company compensation of 19*s.* 6*d.* a week for the loss of his earning capacity owing to the first accident.

"On February 21, 1934, he suffered a second accident at a time when he was being employed and receiving as a labourer 40*s.* 4*d.* a week. The compensation when accurately determined on this second accident would be 22*s.* 7*d.* a week. The railway company, who have been his employers throughout, claimed that, inasmuch as he was already receiving 19*s*. 6*d*. in respect of the first accident, they were not liable to pay him the 19*s*. 6*d*. plus the compensation of 22*s*. 7*d*. in respect of the second accident. They applied the limit established by s. 9, sub-s. 1 (*c*), of the Act, and claimed that their liability could not be greater than a total sum of 30*s*. a week; in other words, if they paid him the 22*s*. 6*d*. in respect of the second accident they were only liable for 7*s*. 5*d*. and no more, out of the 19*s*. 6*d*. The workman disputed that and claimed that he was entitled to be paid the two several sums of 19*s*. 6*d*. for the first accident and 22*s*. 7*d*. for the second accident, that being the sum fixed at the respective times when his earning capacity was found to be diminished by reason of the injuries that he had successively received on the two occasions when he was injured."

The county court judge made his award in favour of the railway company.

The workman appealed. The appeal was heard on March 4 and 5, 1935.

W. Shakespeare for the appellant.

W. H. Duckworth for the respondents.

The arguments sufficiently appear from the judgments. The following authorities were referred to: *Hodgson* v. *Owners of West Stanley Colliery* (1); *Harwood* v. *Wyken Colliery Co.* (2); *Noden* v. *Galloways, Ld.* (3); *M'Kinstrey* v. *Auchinlea Coal Co.* (4)

LORD HANWORTH M.R. This appeal must be allowed. It raises an interesting point, which has been well presented to us by counsel on both sides, under the Workmen's Compensation Act, 1925. The facts are not in dispute and can be quite shortly stated. [His Lordship stated the facts as above set out and continued:] The learned county court judge who dealt with the matter found authority for acceding to the view of the railway company in *M'Kinstrey* v. *Auchinlea Coal Co.* (4) The point which had to be dealt with there

(1) [1910] A. C. 229.

(2) [1913] 2 K. B. 158.

(3) [1912] 1 K. B. 46.

(4) 1920 S. C. 75.

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was the same as that with which we are now dealing, and Lord Dundas, who gave the judgment, said (1): "In one of these decisions by Sheriff Shennan, in a portion of his note which was read to us, he points out that, in his view, compensation under the Act is not for a man's injury but for his incapacity, that that incapacity is one and indivisible, and that it can never be more than total incapacity, however many injuries by accident the man may have suffered from. I think that is the key to the whole problem."

I find some difficulty in understanding the canon there laid down, or in recognizing that under the Act the workman's incapacity is one and indivisible. Cases may occur in which there are successive accidents, and it seems to me somewhat arbitrary to say that the incapacity is one and indivisible, and that it can never be more than total incapacity, without some foundation being provided by the Act itself. With great respect, therefore, to the decision of the Court of Session I cannot accept that as a conclusive authority on the point which we have to determine.

I turn, therefore, to see how the matter stands on the Acts which we have to construe. Sect. 1 of the Workmen's Compensation Act, 1906, in words which are afterwards reproduced in the Act of 1925, the latter Act being a consolidating Act, establishes that: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." In that Schedule the rules for estimating the scale and conditions of compensation are laid down. In cl. 1 (*b*) of the Schedule a limit is provided that such weekly payment is not to exceed 1*l*. That limit is now 30*s*.

It is noticeable and, therefore, I call attention to it because I think that Mr. Duckworth found some importance in it, that in cl. 3 of the Schedule there are words which have not now been reproduced in the consolidating and later Act. The words are: "In the case of partial incapacity the weekly

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(1) 1920 S. C. 79.

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payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." That range of discretion is no longer reproduced in the later Act.

It will be observed that the first compensation determined in favour of the workman arose and was to be paid under the Act of 1906, but no different characteristics are to be appropriated to that payment than to the payment which has now been ordered under the later Act.

I turn, therefore, to consider the consolidating and later Act of 1925. The right to compensation is established by s. 1. The liability of the employers for injuries to their workmen is once more laid down in s. 1; but inasmuch as the scale and conditions on which that compensation is to be estimated are not in the Schedule but in the Act itself, there is just that change of language in s. 1 of the Act of 1925 which is appropriate to the fact that one has to look at the sections and not at the Schedule. I turn, then, to consider the provisions which are "hereinafter contained." By s. 9, bearing in mind that the liability of the employer is to pay compensation, we find the determination of what that compensation is to be. Sub-s. 1, so far as material, reads as follows: "The compensation under this Act where total or partial incapacity for work results from the injury shall be a weekly payment during the incapacity of an amount calculated in accordance with the rules hereinafter contained." There is no dispute that the rules governing the calculation which resulted in *22s. 7d.* in respect of the later Act have been observed. What is relied upon is cl. (*c*) of the proviso, which states: "The weekly payment shall in no case exceed thirty shillings." Does that apply to the total compensation to be received by the workman, or does it apply to the weekly payment which is the subject of measurement under s. 9? As I pointed out during the argument of Mr. Duckworth, the terms of cl. (*c*) are not found in an independent section of wide application ; they are found in a proviso to the section which lays down the rules how the weekly payment during the incapacity is to be estimated. It is said that the result is unfair to the employers. It is right to say that these employers have not attempted to suggest that a difference applies to them because they are the same employers. They are content to have the matter determined as if they were on these two separate occasions two independent employers, and they are right, I think, in taking up that attitude.

What has happened in the present case ? The man suffered a partial incapacity for work by the accident which happened on January 7, 1921, but he was left with some capacity for work. It is true that that capacity was reduced, in terms of money, from 4*l*. 4*s*. 9*d*. to 40*s*. 4*d*., but there was a remaining capacity. And inasmuch as the capacity had been so reduced it seems not unfair that the measure of that capacity should be quantified at the sum of 19*s*. 6*d*. a week. The remaining capacity that was left to the man enabled him to get 40*s*. 4*d*. A second accident has once more invalidated that capacity and he is not now able to earn that sum, and the quantified payment due to him in respect of that second loss of capacity is 22*s*. 7*d*. I do not find it possible to apply cl. (*c*) to circumstances of that sort, and to say that the weekly payment, however it arises, shall in no case exceed 30*s*. and thus to reduce the two payments of 19*s*. 6*d*. plus 22*s*. 7*d*. to 30*s*. and no more.

It must be remembered that the compensation that is given to the workman is statutory. It is of value to look at the words of Hamilton L.J., as he then was, in *Harwood* v. *Wyken Colliery Co.* (1) Hamilton L.J. in that case, having given a caution against reading into the Act words which are not found there, said (2) : " The Act is a ' compensation ' Act, but it compensates the workman in a new and statutory manner in respect of a wholly statutory right. In assessing damages for injury caused to a plaintiff workman by the tortious negligence of the employer or his servants a jury

(1) [1913] 2 K. B. 158.

(2) Ibid. 169.

would be directed that, their damages being a compensation once for all, they must consider not merely past injury, pain and suffering endured, expenses incurred and earnings lost, but also future loss. They would have to measure in money the future effects of permanent or continuing disablement, but they must consider also the possibility of future diminution or loss of earnings." He then goes on to point out that the compensation for workmen under the Act is very different, and he said: "It measures compensation by reference to the past with a strict limit of 50 per cent., upon the relation of the future weekly payments to the average weekly earnings." And again: "The period of continuance of the weekly payment is during 'the incapacity,' that is, the incapacity resulting from the injury, and no reference is made to the possible supervention of other causes of incapacity."

Buckley L.J. in that case translated that same reasoning into terms of money. He said (1): "One test suggests itself which I may state as follows: Suppose the man before sustaining any injury was earning 28*s.* a week, and that he suffers (in his employment with employer A.) a first injury which reduces his earning capacity to 21*s.*, and suppose that he then suffers (in his employment with employer B.) an injury which produces total incapacity, and would still produce total incapacity even if the first injury had not been sustained. At the date of the first accident he was a 28*s.* man reduced by injury to 21*s.* At the date of the second accident he was a 21*s.* man reduced by injury to total incapacity. For the second injury he will be compensated on that latter footing. His compensation for the first injury, by which he was reduced from a 28*s.* man to a 21*s.* man, ought to continue also."

In other words, both he and Hamilton L.J. pointed out that this compensation is a statutory compensation measured in respect of the accident that happened to the man. The period of the weekly payments is during the incapacity resulting from the injuries. That reasoning, to my mind, appears cogent to indicate that this weekly payment which

(1) [1913] 2 K. B. 167.

is to be made, and which is in no case to exceed the 30*s.*, is the weekly payment which is the form the compensation takes for the accident under consideration at the time when the compensation—that is, the weekly payment—is determined.

I will only refer to one more case:—*Hodgson* v. *Owners of West Stanley Colliery*. (1) In that case the sum payable to a dependant as the result of the loss of three persons on whom she was dependent had to be estimated. It was held that she could recover the loss of her dependency on both the earnings of her husband and of her two sons, and that a person who is a dependant on more than one workman can recover more than the maximum amount of compensation which is provided in r. 1 (*a*) of the First Schedule to the Act of 1906 in respect of the death of one workman only.

We are not considering here a question of dependency but of two successive accidents, though that case is an illustration of the importance of doing what Hamilton L.J. said one must do, follow the terms of the Act very closely in determining the statutory compensation payable to the workman. And unless one finds some statutory term which will provide the limit appropriate to cut down these two sums when added together, one is not entitled to do that, because one may a priori think that the intention of the Act, though not expressed, was that there should be a total liability of the employer for 30*s.* and no more. *Hodgson's* case (1) gives an illustration that the Act is to be followed, even though limits are found in the case of dependency which may be passed by reason of the particular circumstances. If the working of the Act so results, one ought not to be afraid to give effect to the Act. Indeed, one is bound to follow it, because the compensation is statutory and is determined by the statute and by its terms alone.

On these grounds I find it impossible to apply the statutory limit in the proviso to the two sums of 19*s.* 6*d.* and 22*s.* 7*d.* The result is that the appeal must be allowed with costs, and an order made for payment on that basis, as well as the sums which have already accrued due to the workman.

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(1) [1910] A. C. 229.

SLESSER L.J. On January 7, 1921, the workman while employed at the Darlington Brass Foundry met with an accident whereby the second finger of his right hand was crushed, and he became incapable of work. After various adjustments and negotiation since 1929, at any rate, he has been receiving compensation for partial incapacity at the rate of 19*s.* 6*d.* a week. That compensation for partial incapacity continues without any change of circumstance being suggested until, on February 21, 1934, he met with a second accident, being then employed by the same employers, whereby his right thumb was crushed, and he was temporarily totally incapacitated. Had it not been for that second accident, there could be no question but that he would still have been entitled to payment at the rate of 19*s.* 6*d.* on the basis of the partial incapacity; but in so far as the employers after the second accident became liable to pay him at the rate of 22*s.* 7*d.* a week compensation for the total incapacity arising from the second accident on February 21, 1934, they declined to continue to pay him the whole of the 19*s.* 6*d.*, saying that that sum added to the sum they were paying him on the basis of total incapacity would have amounted to 2*l.* 2*s.* 1*d.* a week, and reduced the amount for partial incapacity from 19*s.* 6*d.* to 7*s.* 3*d.*, because they said that sum would bring the total which they were paying him up to 30*s.* a week, and that 30*s.* a week was as much as they were compelled under the statute to pay him in any event.

What we have to consider is whether they were justified in so reducing that amount. In my opinion they were not. At one time it was argued that in a case of this sort, where an accident causing total incapacity has followed an accident causing partial incapacity, no compensation at all was payable after the second accident on the basis of the partial incapacity, because it was said that if the partial incapacity was removed the workman would be no better off from the point of view of capacity since, ex hypothesi, he is totally incapacitated.

That view, which had been urged in *Harwood* v. *Wyken Colliery Co.* (1), is stated in terms by Buckley L.J. and in

(1) [1913] 2 K. B. 158, 167.

terms rejected. The learned Lord Justice there said that the compensation for the first injury—that is, the compensation here for the partial incapacity—must continue as well as such compensation as is attributable to the second injury, though, of course, the compensation on the basis of total incapacity may be less by reason of the first injury, because the man's capacity to earn was only a partial capacity when he met with the second injury. Again, he said (1): "If the sounder argument be, as I think it is, that the consequences of the first injury still continue, because it resulted in his standing at the date of the second injury in such a position that that second injury did him less pecuniary damage than it would otherwise have occasioned, then the appeal must succeed."

I think, myself, that if the other view had prevailed the employers in the present case need not have reduced this man's compensation for partial incapacity to 7*s.* 3*d.*; they would have been justified in ending it altogether and paying him merely on the basis of total incapacity for the second accident. If the proper view of this case is that the 19*s.* 6*d.* is still being paid in relation to the incapacity for work arising out of the injury from the first accident, it is clear, if one applies that circumstance to s. 9 of the Act of 1925, or to the corresponding Schedule, with slight modifications in language, in the Act of 1906, that the limitation of 30*s.* contained in cl. (*c*) of the proviso to s. 9, sub-s. 1, can only relate to the subject-matter of the compensation in question; that is to say, the compensation being for partial incapacity (that is, the 19*s.* 6*d.* a week which we are told by the authorities is to continue), it is provided that the weekly payment shall in no case exceed 30*s.* As the weekly payment for that injury and that incapacity is only 19*s.* 6*d.* the statute does not, in my view, operate to prevent this man having the 19*s.* 6*d.* on that separate issue of compensation for partial incapacity.

With great respect I find myself unable to understand the reasoning of Lord Dundas in *M'Kinstrey* v. *Auchinlea Coal Co.* (2) to the effect that the 30*s.* is a general limiting provision to

(1) [1913] 2 K. B. 168.

(2) 1920 S. C. 75.

the whole of the compensation. He seems to arrive at that conclusion in fact he so states, on the view that the incapacity is one and indivisible and that it can never be more than total incapacity however many injuries by accident the man may have suffered from. That view appears to me to have been expressly rejected, so far as this country is concerned, in *Harwood* v. *Wyken Colliery Co.* (1) The partial incapacity is not so absorbed into the total incapacity that there is but one claim; there are two separate and continuing liabilities giving rise to two separate claims for compensation. Because the decision in *M'Kinstrey* v. *Auchinlea Coal Co.* (2) seems to me to do violence to the authorities binding upon us in England I cannot follow it in this case. The fact that moneys are being paid to the workman for the second injury which, together with the money to which he is entitled for the first injury, exceed 30*s*. is irrelevant to the consideration of s. 9, which is whether under the claim there made for partial incapacity the total sum has or has not amounted to 30*s*. As it has not so amounted I think the man is entitled to continue to have it. The appeal succeeds.

ROMER L.J. I agree. The case comes before us in this way. The applicant was a man who originally had a wage-earning capacity of 4*l*. 4*s*. 9*d*. a week. In January of 1921 he was injured by an accident, with the result that his wage-earning capacity was reduced from that time to the sum of 2*l*. 0*s*. 4*d*. a week. He accordingly obtained compensation from his employers under the Workmen's Compensation Act of 19*s*. 6*d*. a week, and that sum, I understand, has been paid to him under an unrecorded agreement—whether under an unrecorded agreement or an award makes no difference for the present purpose. In February of 1934, while in the employment of the same employers, there was another accident the result of which was that his earning capacity of 2*l*. 0*s*. 4*d*. a week was reduced for two months to vanishing point; in other words, he became during that period totally disabled and in respect of that disablement, total incapacity, occasioned by the second accident he was awarded the sum of 22*s*. 7*d*.

(1) [1913] 2 K. B. 158.

(2) 1920 S. C. 75.

a week. The question which we have to determine is whether during the two months that he was receiving weekly payment as compensation for the second accident he was entitled to receive both the 19*s*. 6*d*. and the 22*s*. 7*d*. or only, in all, 30*s*. a week.

It is agreed that for the purpose of considering that question it matters not that the accidents in point of fact took place while the man was in the employment of the same employer. One is, therefore, entitled to consider the question as though the first accident took place while the man was in the service of one employer and the second accident took place while he was in the service of a second employer. On that basis let me look at the matter from the point of view of the first employer. At first sight a very arguable position for that first employer to take up would appear to be this: "You were receiving 19*s*. 6*d*. a week from me while you were partially incapacitated, but in February, 1934, you became totally incapacitated by an accident which had nothing whatsoever to do with the accident which you suffered while in my employment. In other words, you would even without the accident which happened to you in my employment have been totally disabled during the two months in question, and therefore I should not be called upon to pay you 19*s*. 6*d*. Let your compensation for that total incapacity be paid by the man in whose service it was caused." That argument, however, was addressed to this Court in *Harwood's* case (1) and was rejected. In that case a man who was receiving a weekly payment became totally incapacitated by reason of heart disease not occasioned by any accident but by natural causes, and the employer who was paying the weekly payment said: "Well, in any case you would have been incapacitated by this heart disease which was not in any way brought on by the accident which you had sustained while in my employment and the payment should accordingly cease." That, said the Court of Appeal, was not the law, and the weekly payment must continue even although the man had become totally incapacitated by a cause that had no connection

(1) [1913] 2 K. B. 158.

whatsoever with the accident in respect of which the weekly payment was being made.

In the present case, therefore, the first employer, in accordance with that decision, would have been compelled to continue the payment of 19*s.* 6*d.* even during the period of two months when the man was totally incapacitated by an accident which had no connection whatsoever with the first.

Now let me look at the matter from the point of view of the second employer. He takes into his employment a man whose wage-earning capacity is 2*l.* 0*s.* 4*d.* a week. If, while in his employment, the man is totally disabled by an accident so that he can no longer earn 2*l.* 0*s.* 4*d.* a week one would think that for the purpose of ascertaining the compensation to be paid by the second employer it would be a wholly immaterial question whether the man's original incapacity—that is to say, whether the fact that he was not able to earn as much as a normal man when he entered the employment of the second employer—was due to natural causes existing perhaps from his birth, or to an accident in respect of which he had received no compensation, or to some accident in respect of which he had been compensated. Supposing that the second accident was caused by the negligence of the second employer and the workman sued the employer at common law. The workman's damages would not be in any way increased by the fact that his original incapacity was due to a natural cause, nor would the damages be diminished by reason of the fact that he had been compensated in respect of the first accident. But it is said if, instead of suing the employer at common law, he takes proceedings under the Workmen's Compensation Act, 1925, and gets a weekly payment awarded to him, the amount of that weekly payment will depend on the way in which, if at all, he has been compensated in respect of his original accident.

Supposing that the first disability was caused by an accident in respect of which he either sued his employer for negligence and obtained a lump sum in damages or in respect of which he took proceedings under the Workmen's Compensation Act and was awarded a weekly sum which has become redeemed.

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It is not suggested in that case that, in ascertaining the weekly payment to be made for his second accident, the lump sum received by the workman is to be taken into consideration at all. But it is said that if he obtains compensation under the Workmen's Compensation Act in respect of the first accident and is still in receipt of that weekly payment awarded to him, then in respect of his second accident he cannot receive a larger weekly amount than, added to the first, makes the sum of 30*s.* Well, it does not seem sense, but it is said that that is the effect of s. 9 of the Workmen's Compensation Act, 1925.

Now let me look at s. 9 of that Act, first of all reading s. 1, which states: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer"—that is, the person who is employing him at the time of the accident—"shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained." "The provisions hereinafter contained," which fix the amount of the compensation, are to be found in s. 9. Sub-s. 1 of that section states: "The compensation under this Act where total or partial incapacity for work results from the injury shall be a weekly payment during the incapacity of an amount calculated in accordance with the rules hereinafter contained." If the matter stopped there it would be perfectly plain. When the workman in the present case was deprived of his earning power of 2*l.* 0*s.* 4*d.* a week by accident arising out of and in the course of his employment he became entitled to receive under s. 1 and s. 9 from his employer—that is the second employer—a weekly payment during his incapacity, and that weekly payment, if calculated in accordance with the subsequent provisions of the Act, would amount to 22*s.* 7*d.* a week. But, on the other hand, there is this provision: "(*c*) The weekly payment shall in no case exceed 30*s.*" That is perfectly plain, is it not?—the weekly payment which is to be paid by the employer in respect of the particular accident is not to exceed 30*s.* It does not say that in no circumstances shall a workman be entitled to weekly payments under the

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Workmen's Compensation Act, 1925, which in all shall exceed 30*s*. It is dealing, and dealing only, in that proviso with the weekly payment which is to be paid, in the case that I have supposed, by the second employer in respect of the diminution—the wiping out in fact for two months, of the man's wage-earning capacity of 2*l*. 0*s*. 4*d*. a week.

The question admittedly has never come up for decision by the High Court in this country, though we are told by the county court judge that the matter did come before the late Judge Turner (the case is not reported) and that that learned judge decided the point in favour of the workman. But there is a decision in the Court of Session on this point in favour of the employer:—*M'Kinstrey* v. *Auchinlea Coal Co.* (1) As regards that decision I will only say that I cannot help thinking from the terms of the judgment of Lord Dundas, whose judgment alone is reported, that it proceeded on a view of the Act which was different from the view taken by this Court in *Harwood's* case. (2) If the Court of Session intended to decide that in no case shall the total weekly payments paid to any workman under the Act exceed 30*s*. a week, I respectfully venture to disagree.

For these reasons as well as those given by the other members of the Court, I think that this appeal should succeed.

Appeal allowed.
Leave to appeal to the House of Lords granted.

Solicitors: *Pattinson & Brewer; I. B. Pritchard.*

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(1) 1920 S. C. 75.

(2) [1913] 2 K. B. 158.

W. I. C.

J. H. DEWHURST, LIMITED *v.* EDDINS.

1935
March 27, 28.

Sale of Food—Butchers' Meat—Sale otherwise than by net Weight—Stuffed Meat—Sale of Food (Weights and Measures) Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 63), *s.* 5, *sub-s.* 1.

A sale of a piece of stuffed butchers' meat, so labelled and asked for as such by the purchaser and weighed together with the stuffing, is not a sale of butchers' meat otherwise than by net weight within the prohibition in s. 5, sub-s. 1, of the Sale of Food (Weights and Measures) Act, 1926, the meat not being sold as butchers' meat but as a composition called stuffed meat.

CASE stated by the Cardiff stipendiary magistrate.

On April 5, 1934, the respondent, the chief inspector of weights and measures for the council of the city of Cardiff, preferred an information against the appellants, J. H. Dewhurst, Ld., for that they on March 14, 1934, did unlawfully sell at No. 2 The Hayes, Cardiff, butchers' meat, namely, pork and lamb, otherwise than by net weight, contrary to s. 5, sub-s. 1, of the Sale of Food (Weights and Measures) Act, 1926 (16 & 17 Geo. 5, c. 63). The magistrate convicted the appellants and fined them 5*s.*, but stated this case.

The following facts were proved or admitted. The appellants were the occupiers of a retail butchers' shop at No. 2 The Hayes, and on March 14, 1934, a servant in their employ sold at the said shop to an assistant employed in the weights and measures department of the Cardiff council, two pieces of butchers' meat, to wit, a piece of lamb and a piece of pork. Both pieces were exposed for sale in the window of the shop and were marked "stuffed meat," the lamb being marked "8*d.*" and the pork "1*s.* 3*d.*" The purchaser asked for and was supplied with the two said pieces of meat. Both pieces, with stuffing, were weighed in the presence of the purchaser, the pork weighing 1 lb. 4 oz. and the lamb 1 lb. The purchaser paid 8*d.* for the lamb and 1*s.* 3*d.* for the pork. Both pieces were stuffed with a mixture of chopped meat, breadcrumbs, parsley, etc., the weight of the stuffing in each case being

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about ¼ lb. The meat sold would require to be cooked before being fit for human consumption.

By s. 13, sub-s. 1, of the Act of 1926: "For the purpose of this Act unless the context otherwise requires . . . . The expression 'butchers' meat' means beef, mutton, veal, lamb or pork, whether fresh, chilled, frozen or salted, and includes livers, but does not include heads, feet, hearts, lights, kidneys or sweetbreads, bacon, ham, pressed beef or any meat so treated as to be fit for human consumption without further preparation or cooking."

R. T. Sharpe for the appellants. The magistrate was wrong. This is a penal section and should be strictly construed. In s. 7 of the Sale of Horseflesh, &c., Regulation Act, 1889 (52 & 53 Vict. c. 11), which defines "horseflesh," it is to include "horseflesh, cooked or uncooked, alone or accompanied by or mixed with any other substance." These last words are omitted from s. 5, sub-s. 1, of the Act of 1926, and should not be read into it. These pieces of meat were not "butchers' meat" within the meaning of the sub-section, but were a separate and different article—namely, "stuffed meat," so marked, and purchased as such. This was not a colourable attempt to avoid the Act, as, for example, by adding some trifle to butchers' meat and selling it as something other than butchers' meat.

[The Public Health (Meat) Regulations, 1924 (S. R. & O. 1924, No. 1432), cl. 2, sub-cl. 1, was also referred to.]

Owen George for the respondent. Where a person sells a commodity of which butchers' meat forms a part three views can be taken as to the applicability of s. 5, sub-s. 1, of the Act of 1926. Firstly, it may be contended that the sub-section does not apply because it is concerned with butchers' meat and nothing else. Secondly, that if there is any butchers' meat at all in the composite article the sub-section applies, because it cannot be denied that butchers' meat has been sold, and the addition of something else with it cannot alter its nature. These are the extreme views. But there is a third view—namely, that the sub-section applies where that which is sold is substantially butchers' meat in character and nature, as, it is contended, was the case here. It is significant that stuffed meat is not among the things enumerated as not being "butchers' meat" in s. 13, sub-s. 1, of the Act of 1926, the definition section.

[Lawrence J. If a customer asked for stuffed meat and was given meat only, the vendor would commit an offence under s. 2, sub-s. 1, of the Food and Drugs (Adulteration) Act, 1928 (18 & 19 Geo. 5, c. 31), as having sold to the prejudice of the purchaser an article not of the nature, substance or quality of the thing demanded.]

The question was one of fact for the magistrate, and one of degree. A piece of beef with a sprig of parsley is still butchers' meat, but a Cornish pasty is not. The purchaser here did not know how much meat he was getting, and it was in order to ensure that he should know that the Act was passed. If it is held that this was not a sale of butchers' meat it is difficult to see how the sale of a joint of meat with kidney attached, which is very common, is such a sale, kidneys, by s. 13, sub-s. 1, of the Act of 1926, not being butchers' meat.

R. T. Sharpe replied.

Avory J. This case raises a small point, but has given rise to very substantial arguments on both sides, and it is quite possible to find reasons for holding either way. The facts are set out in the special case, which recites that two pieces of meat, a piece of lamb and a piece of pork, were exposed for sale in the window of a shop and marked "stuffed meat," and that the price was marked on each; and the case states that the purchaser asked for and was supplied with those two very pieces of meat.

In those circumstances the question to be decided is whether the butcher was selling butchers' meat. If he was it is not disputed that he was selling it otherwise than by net weight, because he was weighing the stuffing with it. The magistrate upheld the contention of the respondent that the sale of butchers' meat and stuffing together was a sale of butchers' meat otherwise than by net weight and that the stuffing should not have been sold with the meat.

I have come to the conclusion that the magistrate's decision was wrong, on the ground that the pieces of meat were not sold as butchers' meat, but were sold as a composition called stuffed meat. The purchaser asked for and was supplied with stuffed meat, and in those circumstances the butcher was not selling butchers' meat within the meaning of s. 5, sub-s. 1, of the Sale of Food (Weights and Measures) Act, 1926. I do not think it necessary to deal with the illustrations given on both sides, which may create difficulties in the future. One such difficulty arises owing to the definition of butchers' meat in s. 13, sub-s. 1. That definition excludes kidneys, and the difficulty which has been foreseen arises from the impossibility of ascertaining the net weight of butchers' meat in a joint sold with the kidney in position. But it is unnecessary to decide that matter now.

The appeal must be allowed and the conviction quashed.

HAWKE J. I agree.

LAWRENCE J. I also agree.

Appeal allowed.

Solicitors for appellants: *Wilfrid Ellis, for Phœnix, Levinson & Walters, Cardiff.*

Solicitors for respondent: *Smith, Rundell, Dods & Bockett, for D. Kenvyn Rees, Cardiff.*

W. L. L. B.

CLACK *v.* CLACK.

1935
March 28.

Husband and wife—Maintenance—Order by magistrate for weekly payments—Deduction of income tax by husband—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 19, *sub-r.* 1.

Where a maintenance order is made by a magistrate whereby a husband is ordered to pay a certain sum weekly to his wife, the husband is entitled to deduct income tax.
Smith v. *Smith* [1923] P. 191 applied.

CASE stated by a Metropolitan police magistrate.

On February 2, 1932, a maintenance order was made by a Metropolitan police magistrate against the appellant, David James Clack, in favour of the respondent, his wife, Lilian Maud Clack, whereby he was ordered to pay her 30*s*. per week and 5*s*. per week in respect of each of the three children of the marriage, a total of 45*s*. per week. At first the appellant duly paid these sums. In July, 1933, a demand having been made on him by the revenue authorities for payment of income tax on those payments, as being annual payments within the meaning of r. 19, sub-r. 1, of the General Rules for all Schedules of the Income Tax Act, 1918 (1), he deducted, and from that time onwards continued to deduct, from the sums sent to the respondent the amount of the income tax on those payments. On June 13, 1934, the sum of 24*l*. 19*s*., being the aggregate of the sums deducted, was claimed by the respondent as being payable under the terms of the order. The respondent now sought an order for the payment of this sum.

The magistrate held that the appellant was not entitled to deduct the amount of the income tax, and made an order for the payment of the amount claimed, but stated this case.

Acton Pile for the appellant. The appellant was entitled to deduct income tax. The payment was an "annual payment" within the meaning of r. 19, sub-r. 1 (1): *Smith*

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(1) Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), General Rules applicable to Schedules A, B, C, D, and E, r. 19: "(1) Where any yearly interest of money, annuity, or any other annual payment . . . . is payable wholly out of profits or gains brought into

v. *Smith.* (1) By reason of the above rule the appellant was bound to pay the tax, and therefore, under the rule, was entitled to deduct it, and the respondent was bound to allow the deduction. This will work no hardship on the wife, who, if her income is sufficiently small, can get repayment from the revenue authorities, while if she is liable to the tax then it has been paid on her behalf. As the order stands the appellant has to pay more than the magistrate ordered—namely, 45*s.* plus income tax. In principle *Smith* v. *Smith* (1) governs this case. The Divorce Court can make an order for payment of alimony free of income tax: *Blount* v. *Blount* (2) and *Smith* v. *Smith* (1); and where the Divorce Court orders the execution of a deed to secure payment of a certain sum free of income tax the deed can be modified so as to secure the payment of such a gross sum as, after deduction of income tax, will leave a net sum equal to the sum ordered to be paid: *Burroughes* v. *Abbott.* (3) But the magistrate had no jurisdiction to order a payment free of tax, and effect ought not to be given to an order which would produce that result.

[*In re Janes' Settlement* (4) and *Cobb* v. *Cobb* (5) were also referred to.]

The respondent in person.

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charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due.

The person to whom such payment is made shall allow such deduction upon the receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid."

Rule 21: "(1.) Upon payment of any . . . . annual payment charged with tax under Schedule D . . . . the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment."

(1) [1923] P. 191.

(2) [1916] 1 K. B. 230, 238.

(3) [1922] 1 Ch. 86.

(4) [1918] 2 Ch. 54.

(5) [1900] P. 294.

AVORY J. This case has raised a troublesome question, but I have come to a definite conclusion that the order of the magistrate cannot be sustained. On February 2, 1932, a complaint was made by the respondent, asking for an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1925, on the ground of the desertion of her husband, and an order was made by the learned magistrate on that date that the husband should pay to the chief clerk of the court, on behalf of the wife, a sum of 30*s.* a week and a further sum of 5*s.* a week in respect of each of their three children, a total of 45*s.* a week. The appellant duly paid the sums ordered to be paid until a date in July, 1933, when a demand was made on him by the revenue authorities for payment of income tax on those payments. The demand was made on the ground that the payments were annual payments within the meaning of r. 19, sub-r. 1, of the General Rules for all Schedules of the Income Tax Act, 1918, and I am bound, on the authority of *Smith* v. *Smith* (1), to hold that these payments were annual payments within that rule. Having been called on to make those payments, he from that time onwards deducted the amount of them from his payments under the order of February 2, 1932, until on June 13, 1934, 24*l.* 19*s.* was alleged to be due as arrears under the order. That statement in the special case looks at first sight as if he had failed to pay instalments, but in fact he had paid the full amount less the income tax; 24*l.* 19*s.* represents the total of the deductions from sums paid over to the respondent.

On behalf of the respondent it was contended before the magistrate that the order of February 2, 1932, specified the weekly sums which the respondent was entitled to receive, and that the appellant was not entitled to make deductions for income tax. On the other side it was contended that there was no jurisdiction to order payments free of income tax, and that the order did not purport to so order, and that *Smith* v. *Smith* (1) governed the present case.

Once the conclusion is reached that the sums claimed by Mrs. Clack were in fact the aggregate of the sums deducted

(1) [1923] P. 191.

by way of income tax by the appellant, it becomes necessary to consider the second clause of r. 19, sub-r. 1, which provides as follows. [His Lordship read the rule (1) and continued :] This rule has statutory force, and there is no question raised here but that the appellant had no option in the circumstances other than to make the deductions in his returns to the income tax authority. Further than that, r. 21, sub-r. 1, provides as follows. [His Lordship then read that rule. (1)] There being therefore no option but to deduct those amounts, it appears to me to follow that it became the respondent's duty to permit the deductions to be made, and that thereupon the appellant became, in the words of the rule, acquitted and discharged of the amount of the deductions as if those amounts had been paid to the respondent. In those circumstances I do not think it was competent for the magistrate to order the appellant to pay sums of which he had already been acquitted and discharged. The appeal must therefore be allowed.

HAWKE J. I agree, though I confess that I should have been glad to find reasons for deciding otherwise, for I am satisfied in my own mind that those dealing with this limited form of maintenance never thought about income tax at all. But for the reasons given by my Lord, I agree that the appeal must be allowed.

LAWRENCE J. I also agree. I only wish to add that it is impossible to construe the magistrate's order, having regard to the decision in *Smith* v. *Smith* (2), as an order to pay 30*s.* a week free of income tax, or that such sum should be paid as would bring to the wife a clear 30*s.* a week. But I do not agree with Mr. Acton Pile's contention that the magistrate could not have made such an order, had he desired to do so, provided always that the total burden on the husband did not exceed 40*s.* a week.

Appeal allowed.

Solicitors for appellant : *Percy Haseldine & Co.*

(1) See note (1) ante p. 109.

(2) [1923] P. 191.

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Feb. 5, 6, 7;
March 1.

[J. 1177, 1178.]

Company—Permanent and ordinary Directors—Debts owing by two ordinary Directors—Balance-sheet signed by debtors stating amount of debts owing by them—Instructions for action to recover debts given by permanent Directors only—Whether action properly brought—Balance-sheet not an account stated.

The defendants, who were directors of and were indebted to the plaintiff company, agreed to Terms of Settlement by which (inter alia) the first defendant should resign his office as governing director, that the company should appoint independent persons as permanent directors, that the two defendants, with three others, should be ordinary directors, that the company's articles should be altered so as to provide that the defendants should have no control over, and have no right to vote in respect of, their debts, that an accountant should certify the amount of the defendants' liability, that the dividends payable to the defendants should be retained by the company on account of those debts, which, however, were not to be called in for twenty years, and that these terms should be embodied in an agreement under seal and sanctioned by special resolutions of the company. Special resolutions embodying that agreement were thereafter passed which provided also that all the ordinary directors should have no right at directors' meetings to vote in respect of the company's financial affairs, and that with regard to other business they were to have only such rights of voting and control over the management as might be conferred upon them by the permanent directors.

An accountant prepared a balance-sheet which showed the amount due to the company by each of the two defendants, and that balance-sheet, which was signed thus: "Peter Shaw, John Shaw, Directors," was adopted at a general meeting of the company at which the defendants were present.

The agreement under seal containing the above Terms of Settlement was sealed by the company, but the defendants having declined to execute it, as they objected to certain of its terms, the permanent directors, at a meeting to which none of the ordinary directors was summoned, resolved that instructions be given for writs to be issued against the defendants for the recovery of the debts owing by them, and although by a resolution passed subsequently by the shareholders at an extraordinary meeting of the company the chairman was directed to discontinue proceedings, a writ was issued against each defendant claiming the amount as "found and admitted by the defendant to be due to the plaintiffs as shown by the plaintiffs' balance-sheet." To these actions the defendants pleaded that they had been brought without proper authority, and they denied that the alleged or any account was stated between the plaintiffs and them.

du Parcq J. rejected these contentions and gave judgment for the plaintiffs.

On appeal :—

Held, (1.) as to authority to bring the actions : per Greer L.J., that under the company's articles the power to give instructions for the bringing of the actions was vested not in the directors generally but in the permanent directors, whose decision could not be overridden by the mere resolution of the shareholders, and therefore that the bringing of the actions was duly authorized.

Per Slesser L.J., that the bringing of the actions was not authorized, as authority to do so could not be given at a meeting of directors to which the ordinary directors were not summoned.

Per Roche L.J., that as a rule objection to the right to bring an action should be taken, not at the trial but by interlocutory motion or summons, and if that course is not followed, the Court should not entertain an application at the trial to dismiss the action, but where want of capacity or authority to sue plainly appears at any stage the Court may order the action to be struck out. In this case, however, the Court had not with regard to matters of fact the information necessary for deciding whether effect should be given to the objection to the competency of the actions and the objection therefore failed.

Held, (2.) as to the cause of action relied upon : by the whole Court, that the balance-sheet was not an account stated involving a fresh promise by the defendants to pay the amounts debited to them therein, inasmuch as it was signed by them not animo contrahendi but in performance of their duties as directors.

Decision of du Parcq J. reversed on the second point and judgment entered for the defendants.

APPEAL in two actions tried by du Parcq J. at Manchester.

The plaintiff company sued the defendant Peter Shaw claiming 11,483*l*. 4*s*. and the defendant John Shaw claiming 15,088*l*. 18*s*. 9*d*., in each case as " found and admitted by the defendant to be due to the plaintiffs as shown by the plaintiffs' balance-sheet " dated December 31, 1932.

The plaintiffs were a private company of which the defendants were, with others, directors.

By clause 95 of the articles of association it was provided that " the business of the company shall be managed by the directors who . . . . may exercise all such powers of the company, and do on behalf of the company all such acts as may be exercised and done by the company, and as are not by the statutes or by these articles required to be exercised or done by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the statutes, and to such regulations being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made."

In 1925 the defendants said that they had discovered irregularities in connection with the company on the part of their brother Percy, who was also a director, and they obtained an admission from him that he was accountable to the company to an amount of 13,150*l.*, and in respect of this Percy Shaw executed a mortgage on the whole of his assets in favour of the company. In 1931 Percy Shaw, finding, as he alleged, that the two defendants were also responsible in respect of deficiencies, took proceedings in the Chancery Court of the County Palatine of Lancaster, and in the pleadings in that action the defendants admitted that there was something due from them to the company. That action was settled on the terms that Peter Shaw should resign his office as governing director, that the company should appoint two independent persons to be permanent directors; that Peter, John and Percy Shaw should be ordinary directors; that the company's articles should be altered so as to provide that Peter, John and Percy Shaw should have no control over and no right to vote in respect of the debts due from them or any of them; that an accountant should be appointed to investigate the company's affairs and certify the aggregate liability of the three brothers, whose liability, which they were to admit, was to be made one undivided fund for which each was to be jointly and severally liable, but as between themselves and their personal representatives they were to be liable in equal one-third shares; that dividends payable to Peter, John and Percy Shaw were to be retained by the company on account of the debt, which was not to be called in or the charges given by each of them enforced for a period of twenty years except in the event of a creditors' winding-up of the company. There followed this clause: "These terms must be embodied in an agreement under seal between Peter, John and Percy Shaw and the company, such agreement to be conditional on the company passing the necessary special resolutions and the company's bank being willing to allow the same to be carried out." In March, 1933, the accountant prepared a draft balance-sheet showing the sum due by the three brothers. In August, 1933, a meeting of the shareholders was held at which a resolution was passed cancelling a number of the original articles of association and substituting (inter alia) the following:—

"84. The directors of the company shall be eight in number of whom three shall hold office as permanent directors as hereinafter defined and five shall be ordinary directors. The first permanent directors shall be Ernest Farrell, Charles Halliday, and Mark Wheatley Jones. The ordinary directors shall subject to the provisions of these articles be the present Board, namely, Peter Shaw, John Shaw, Percy Shaw, John Bryan Shaw, and James Fitzgerald Fern.

. . . .

"86. As from August 18, 1933, three of the ordinary directors of the company shall be Peter Shaw, John Shaw, and Percy Shaw, and they shall remain as ordinary directors during their respective lives, so long as they devote their whole time and attention to the business of the company. . . . .

"86A. The said Peter Shaw, John Shaw, and Percy Shaw as directors shall have no control over, and no right to deal with on behalf of the company, any of the debts due from them or any of them mentioned in the said Terms of Settlement and shall have no right as shareholders to vote on any matter connected with such debts and shall have no right either themselves or through their nominees to vote on any question affecting their position as directors either directly or indirectly.

"87. The ordinary directors including the said Peter Shaw

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John Shaw, and Percy Shaw, shall have no right at directors' meetings to vote in respect of, nor shall they have any control over, the financial affairs of the company and with regard to the management of the company's business they shall have only such rights of voting and such control over the management as may from time to time be conferred upon them by the permanent directors. . . .

"111. The permanent directors shall appoint one of themselves as chairman of the company, and another permanent director vice-chairman, and the chairman or in his absence the vice-chairman shall preside at meetings of directors. If at any meeting neither the chairman or vice-chairman is present within five minutes after the time appointed for holding the same the remaining permanent director shall be chairman. No board meeting shall be held unless at least one permanent director is present.

"121A. All dividends payable on the ordinary shares held by Peter Shaw, John Shaw, and Percy Shaw at the date of this resolution shall be retained by the company on account of the debts mentioned in the said Terms of Settlement until the said debts are liquidated. Except as above provided the said debts shall not be called in or the charges mentioned in the said agreement enforced for a period of twenty years from the date of this resolution except in the event of a creditors' winding-up of the company, and this clause shall be so construed that after the death of any one or more of them the said Peter Shaw, John Shaw and Percy Shaw his estate shall be entitled to the benefit thereof."

The company's balance-sheet showed under the heading "Directors' Accounts" the following entries:—

"Peter Shaw :—Balance at debit on 31st December, 1931 . . .	£11,491	0	1
Less : Amounts paid in, less withdrawals . . .	7	16	1
	£11,483	4	0

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John Shaw :—Balance at debit on 31st December, 1931 . . .	£15,080 9 9
Add : Withdrawals less credits	8 9 0
	£15,088 18 9"

With these entries the balance-sheet was signed by the two defendants, thus : " Peter Shaw, John Shaw, Directors," and it was adopted at the general meeting of the company, at which the defendants were present, on October 23, 1933.

The agreement embodying the terms contained in article 121A set out above was sealed by the company, but the defendants did not execute it owing to their objection to the way in which it was drawn up in reference to the charges to be given to the company by them.

Thereafter at a directors' meeting to which neither the two defendants nor the three other ordinary directors were summoned a resolution was carried by a two to one vote of the permanent directors that instructions should be given for writs to be issued against the two defendants claiming the amounts shown by the balance-sheet as owing by them respectively.

By their defences each defendant denied that the alleged or any account was stated between the plaintiffs and them. Alternatively, each defendant said that if there was owing to the plaintiffs the said or any sum (which was not admitted) the same was not a debt presently payable in respect that by the Terms of Settlement dated June 17, 1932, it was agreed that the debt of the defendant, if any, should not be called in for a period of twenty years except in the case of a creditors' winding-up of the plaintiff company. Each defendant also relied on the terms of article 121A, of the plaintiffs' articles of association. Each defendant further said that the demand for payment made in the action was made contrary to the terms of, and without the authority required under the plaintiffs' articles and powers, and had not been sanctioned by any properly convened meeting of the company or its directors, and they relied on a resolution passed by the shareholders at an extraordinary meeting of the company held on April 30, 1934, directing the chairman of directors to instruct the company's solicitors to discontinue the action forthwith.

In his judgment du Parcq J. said that while a director may not necessarily be personally responsible for every statement in a balance-sheet which he signs, yet where he signs on behalf of himself and his fellow directors a statement involving apparently a clear admission of liability by himself to the board, that was prima facie evidence of an account stated unless there was something to rebut that inference. It was said, however, on behalf of the defendants that even if the statement in the balance-sheet was prima facie evidence of an account stated, it was not an admission of a debt presently payable, inasmuch as the Terms of Settlement provided that it was not to be payable for twenty years. The answer to that was that the defendants could not rely upon the Terms of Settlement which they had themselves wrongly repudiated. On the question whether the demand for payment and the proceedings taken to enforce it were properly authorized, he came to the conclusion that where, as in the present case, the defendants as directors were excluded from the right to vote on such a matter it was not necessary to summon them to the meeting at which it was decided to bring the actions. He therefore decided that the points raised on behalf of the defendants failed, and accordingly he gave judgment against them.

The defendants appealed.

H. I. P. Hallett for the appellants. The meeting of the permanent directors purporting to authorize the bringing of these actions was improperly constituted, and therefore the decision arrived at was wholly invalid. Directors exercising the powers conferred by the Companies Act must act together and as a board. To the meeting of the directors in question the fact that the other directors were not summoned invalidated its proceedings. du Parcq J., founding on a dictum of

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Farwell J. in *In re Greymouth Point Elizabeth Railway & Coal Co.* (1), considered that if the two defendants had been present at the meeting in question they could have been asked to withdraw as having an interest in the matter under discussion, but he overlooked the fact that there were two other directors who had no interest in the matter and who in fact were not summoned to the meeting. Moreover, it is essential that a board meeting shall not only be properly constituted—*In re Homer District Consolidated Gold Mines* (2), but that the directors shall act together and as a board: *D'Arcy* v. *Tamar, Kit Hill, and Callington Ry. Co.* (3); and that is not done when certain directors entitled to be present are not summoned to the meeting. The actions, therefore, having been begun improperly ought to be struck out as irregular: *Daimler Co.* v. *Continental Tyre and Rubber Co.* (*Great Britain*). (4) Moreover, even assuming that no effect can be given to the resolution passed at a meeting of the shareholders directing the chairman to instruct the company's solicitors to discontinue the actions, the actions were in any event not maintainable, inasmuch as article 121A, which embodied the Terms of Settlement, provided that the debts claimed were not to be called in for twenty years. It is said, however, that the appellants repudiated the Terms of Settlement and therefore cannot rely upon the agreement for twenty years' credit, but at the same time the company is entitled to rely upon the agreement that each of the appellants is liable for one-third of the aggregate figure of 47,226*l.* 18*s.* 3*d.* They cannot do that.

Further, the entries in the balance-sheet did not constitute an account stated within the definition of that term in *Laycock* v. *Pickles* (5) or the language of Viscount Cave in *Camillo Tank Steamship Co.* v. *Alexandria Engineering Works* (6); see also *Siqueira* v. *Noronha*. (7) An account stated must be an unconditional acknowledgment of a debt due and presently payable. That definition is not satisfied in this case, and, moreover, the signatures of the defendants

(1) [1904] 1 Ch. 32.
(2) (1888) 39 Ch. D. 546.
(3) (1867) L. R. 2 Ex. 158.
(4) [1916] 2 A. C. 307.
(5) (1863) 4 B. & S. 497.
(6) (1921) 38 Times L. R. 134.
(7) [1934] A. C. 332.

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were not added to the balance-sheet animo contrahendi; the defendants signed not as individuals but as directors.

Lynskey K.C. and *P. R. Barry* for the respondents. Having let the actions go to judgment without raising the point it is too late now for the appellants to say that they were commenced without authority. The proper course for the appellants to take was to apply at an early stage by motion to have the actions stayed: *Richmond* v. *Branson & Son* (1); *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse.* (2) It is also said that the act of the directors in giving instructions for the bringing of the actions was revoked by the resolution passed by an extraordinary meeting of the shareholders. This point, which was not taken in the Court below, has no validity. We rely on the following passage in Buckley on the Companies Acts, 11th ed., p. 723, as correctly stating the position and as applicable to the present case: "There is no provision in this Act [the Companies Act, 1929] corresponding with s. 90 of the Companies Clauses Act, 1845, which provides that the exercise by the board of their powers shall be subject to the control of any general meeting specially convened for the purpose. And it appears now to be established that under an article in the present form [article 67 of Table A], whatever effect is to be given to the words 'to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting,' these words do not enable the shareholders, by resolution passed at a general meeting without altering the articles, to give directions to the directors as to how the company's affairs are to be managed, nor to overrule any decision come to by the directors in the conduct of its business, even as regards matters not expressly delegated to the directors by the articles." See also *Automatic Self-Cleansing Filter Syndicate Co.* v. *Cuninghame* (3); *Gramophone & Typewriter, Ld.* v. *Stanley* (4); *Quin & Axtens, Ld.* v. *Salmon.* (5) *Daimler's* case (6), which is

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(1) [1914] 1 Ch. 968, 973–974.

(2) [1925] A. C. 112, 130.

(3) [1906] 2 Ch. 34.

(4) [1908] 2 K. B. 89, 105.

(5) [1909] A. C. 442.

(6) [1916] 2 A. C. 307.

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relied upon by the appellants, dealt with the case of a plaintiff incapable of giving instructions, and not with the case of a plaintiff capable of giving instructions. It is clear on the articles of this company that the power to act in such a matter was vested solely in the permanent directors.

The entry in the balance-sheet is a clear admission of indebtedness by the appellants and satisfies the definition of an account stated as given by Blackburn J. in *Laycock* v. *Pickles* (1): see also *Grundy* v. *Townsend* (2) and *Camillo Tank Steamship Co.* v. *Alexandria Engineering Works.* (3)

Hallett replied.

Cur. adv. vult.

March 1. The following judgments were read :—

GREER L.J. The appellant Peter Shaw in the first of these two appeals, which were heard together, and the appellant John Shaw in the second, ask this Court to reverse the judgment of the trial judge who decided that they were liable to pay to the respondents the respective sums of 11,483*l.* 4*s.* in the action by the respondents against Peter Shaw, and the sum of 15,088*l.* 18*s.* 9*d.* in the action against John Shaw.

The cause of action alleged in both actions was money due on an account stated. The claim was based on the appellants' signature as directors of the respondent company to a balance-sheet in which the sums above mentioned were entered as balances at debit of the appellants respectively. The facts relevant to the determination of the questions involved in the appeal are fully and accurately stated in the judgment of the trial judge, du Parcq J., and I need not state them in detail; but in order to make my judgment intelligible I find it necessary to state what the situation of the parties was immediately before June 17, 1932, when the Terms of Settlement of two actions were provisionally agreed by the respondents and the appellants and their brother Percy Shaw, and the events that followed the settlement. These three brothers were the principal shareholders in the respondent company, and together with a Mr. Fern they formed the board of directors. Peter Shaw was governing director with large powers which under the articles of association, as they then were, gave him absolute power to carry on the business of the company as he thought fit, without consulting the other members of the directorate. Subject to his overriding powers, the other two brothers and Mr. Fern were entitled to exercise the powers exercisable by the directors under the articles. Percy Shaw had in 1925 admitted that he had become indebted to the company in respect of moneys and property of the company which he had wrongfully used for his own purposes in the sum of 13,150*l.*, and had given to the company a mortgage or charge on all his assets to secure the payment of this debt.

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(1) 4 B. & S. 497.

(2) (1888) 36 W. R. 531.

(3) 38 Times L. R. 134, 143.

In 1931 Percy Shaw appears to have discovered, as the fact was, that his two brothers, Peter and John, had been guilty of similar defalcations or breaches of duty to the company. It seems probable that this course had been pursued by the three brothers in order to conceal their true incomes from the income tax authorities. In all probability they did not defraud the other shareholders of the company to any serious extent, as, if they had not in years of prosperity taken the money or property of the company for their private purposes directly, they would have been entitled to much larger dividends than they received on their share; but in that case the income tax authorities would have received from the company and from the three brothers much larger sums in respect of income tax and super tax than they in fact received.

When Percy Shaw discovered that he was not the only black sheep in the flock, he instituted two actions in the Chancery Court of the County Palatine of Lancaster. In the first of these actions he claimed that an account should be decreed against his brothers, and payment to the company of the amount found due on taking the account. The parties to this action were Percy Shaw as plaintiff, Peter Shaw, John Shaw and the company as defendants.

The other action was for an injunction to restrain his removal from the offices of manager and secretary which he then held.

The defendants Peter Shaw and John Shaw delivered a defence to the first of these two actions in these words: "1. Save that there are certain inaccuracies in the particulars given in paragraph 6 of the statement of claim, these defendants admit all the allegations contained in the statement of claim and will submit to judgment as claimed therein."

The business of the company was a family business, the shares in the main being held by the three brothers and their relations, and it was felt by their advisers for many reasons eminently desirable that the action and all disputes should be settled. Negotiations for a settlement resulted in an agreement signed by counsel for the company, for Peter Shaw and John Shaw, and for Percy Shaw. The agreement is dated June 17, 1932. It is not in dispute that the three brothers authorized the signing of this agreement, and were bound by it from the time of its signature. But by clause 14 of the agreement it was stated that the agreement was not to be binding on the company until the consent of the shareholders was obtained by the three brothers "so as to make the said arrangements binding on the company." This clause and clause 15 have such an important bearing on the questions to be decided in this appeal that I think it necessary to read both of these clauses in full: "14. For the carrying out of the above terms the said Peter John and Percy Shaw shall execute and do all such deeds agreements acts and things as may be necessary and shall procure that the company's articles of association are altered and the consent of the shareholders obtained so as to make the said arrangements binding on the company. Peter John and Percy Shaw shall not vote at any meeting of the company called for the purpose of approving or carrying out the said arrangements." "15. The costs of altering the company's articles and the costs of Peter John and Percy Shaw of any negotiations deeds agreements acts and things preliminary to or executed or done for the purpose of carrying out this agreement are to be paid by the company. These terms must be embodied in an agreement under seal between Peter John and Percy Shaw and the company such agreement to be conditional on the company passing the necessary special resolutions and the company's bank being willing to allow the same to be carried out."

In my judgment, as soon as the shareholders approved the agreement it became binding on all the parties. It was not a mere proposal of the terms to be embodied in a deed. It was, in my judgment, a concluded agreement, subject to the condition that the company should pass the necessary resolutions, and the company's bank should allow the same to be carried out. It was common ground that these conditions were complied with. The agreement was not conditional on the execution of a contract under seal. It merely contained as one of its terms that such a deed should be executed.

The material terms of this agreement are accurately stated by du Parcq J. in these words: " Those terms of settlement provided that Peter Shaw should resign his office of governing director and that the company should appoint two quite independent persons to be permanent directors of the company; Peter, John and Percy Shaw were to be ordinary directors; the articles were to be regulated so as to provide that Peter, John and Percy Shaw should have no control over and no right to vote in respect of the debts due from them or any of them; Mr. Halliday, an accountant, was to be appointed to investigate the affairs of the company and certify the aggregate liability of the three brothers to the company; Peter, John and Percy Shaw were to admit that they were responsible for all defalcations which had occurred and their liability was to be made one undivided fund but without interest, and for this fund each of them was to be jointly and severally liable, but as between themselves and their personal representatives liable in equal one-third shares. No interest was to be charged on the fund. The deed of mortgage given by Percy Shaw in 1926 was to be cancelled and in its place Peter, John and Percy Shaw were to charge all their private assets still remaining to the company on account of the joint indebtedness—I say in passing, it seems to me that there could be no doubt still remaining at the date of these terms of agreement. Then there is a provision that dividends were to be paid by the company; dividends payable to Peter, John and Percy Shaw were to be retained by the company on account of the debt and the debt was not to be called in or the charges enforced for a period of twenty years except in the event of a creditors' winding-up of the company. The articles of association were to be altered and the brothers were to procure that they should be altered. Then finally comes this clause: 'These terms must be embodied in an agreement under seal'—there was an obvious reason for that, the debt was not to be called in for twenty years—'between Peter, John and Percy Shaw and the company such agreement to be conditional on the company passing the necessary special resolutions and the company's bank being willing to allow the same to be carried out.' There was a modification of those Terms of Settlement on July 18, 1933, to which I think I need not refer."

It is clear that these Terms of Settlement were provisional in the sense that they would only become the terms of a contract binding as between the company and the three brothers, when the shareholders at an extraordinary general meeting should pass a resolution approving of the terms. (See clauses 4 and 14 of the Terms of Settlement.) It seems equally clear that when such a resolution was passed, the Terms of Settlement became a contract binding on all parties, to be carried out in the manner there set out.

As it seemed reasonably certain that the terms would be approved by the shareholders, Mr. Halliday commenced his investigations without waiting for the shareholders' approval. By such investigations he assessed at the figure of 47,226*l.* 18*s.* 8*d.* the amount which was to be debited to the three brothers as owing by them to the company jointly and severally, and payable as set out in the Terms of Settlement. Though they were all to be jointly and severally indebted to the company, and were entitled to have set off against the total indebtedness all sums due from the company to them or any of them, as between themselves they were to be debited with one-third of the total, and have credit for any moneys due to them respectively by the company, and any payments they might make on account as against their several third shares of the total.

Having ascertained these figures, Mr. Halliday prepared the balance-sheet, which is dated December 31, 1932. He admitted at the trial that he carried out his investigations and prepared his figures under the Terms of Settlement. On March 18, 1933, he sent a copy of the proposed balance-sheet to Peter Shaw with a copy for John Shaw. Peter Shaw took Mr. Halliday's letter and the balance-sheet to his solicitors, Messrs. Richard Hilditch & Sons, and correspondence took place between them and Mr. Halliday's firm.

It is unnecessary to refer to this correspondence. Its substance was that it raised several points for the consideration of Mr. Halliday, and in particular pointed out that the balance-sheet should show that the total liability was a joint liability of the three brothers. Mr. Halliday answered that having regard to the accounts he had to show the amount as divided in equal parts, because " drawings and repayments were dealt with in each director's account," and he added : " The total amount due by directors is clearly shown on the face of the balance-sheet." He obviously did not intend his balance-sheet to be inconsistent with the terms of the settlement. He regarded it as showing the total debt payable as provided by the Terms of Settlement, and entered the several debts in order to show how much the three directors were entitled to by way of set-off or payment on account. It is, however, manifest that the balance-sheet as it stands would be very misleading to any one unacquainted with the Terms of Settlement. The total amount of the joint and several indebtedness of the three brothers should have appeared as one item, and its value as an asset ought to have been discounted by the fact that it was not payable for twenty years. However this may be, it is clear that in putting forward the balance-sheet Mr. Halliday was not presenting it for signature by the directors as an account independent of the Terms of Settlement, but rather as one which was intentionally drawn up in consequence of the settlement terms, and as in no way inconsistent therewith.

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On August 18, 1933, an extraordinary general meeting of the shareholders was held, and resolutions were passed as required by the Terms of Settlement approving those terms with some amendments that had in the meantime been agreed to by counsel for all parties, and altering the articles of association in such a way as to carry out the terms of the agreement so approved. The minutes of this meeting were not put in, but it was not in dispute that the resolutions were duly passed. They are recited in the deed afterwards prepared for sealing and in fact sealed by the company.

Clause 8 of the Terms of Settlement provides that the three brothers were to be bound by the total liability as certified by Mr. Halliday. No formal certificate was produced at the trial, but the brothers on September 25 signed the following letter: "To the Permanent Board of Directors, John Shaw & Sons (Salford) Limited. Dear Sirs, In accordance with clause 8 of the Terms of Settlement, dated June 17, 1933, we hereby agree our liability to the company (which has been made one undivided fund for which each of us is jointly and severally liable in equal one-third shares) to be *47,226l. 18s. 3d.* as certified by Mr. Halliday. (Signed) Peter Shaw, John Shaw, Percy Shaw."

The annual general meeting of the company was held on October 23, and the balance-sheet prepared by Mr. Halliday, and by this time signed by Peter and John Shaw as directors, was passed by the shareholders. It did not appear from any evidence given at the trial when they signed the balance-sheet. I think it was probably signed on some date between September 25 and October 23. However this may be, it is clear that they signed it after the Terms of Settlement had become a binding agreement. As Mr. Halliday and his co-directors, and I think all the shareholders, had approved the agreement, their signatures, if they could be treated as an admission at all, could only be an admission of a debt ascertained and admitted by them under the Terms of Settlement, and therefore as a debt not presently payable, but payable in twenty years. The fact that they afterwards failed or refused to comply with one of the terms of the agreement, could not alter the meaning of their signature, which must be interpreted having regard to the circumstances as they existed at the date when they signed the document.

In December, 1933, disputes arose as to the meaning of the Terms of Settlement which still remained to be performed, and letters passed between the solicitors for Peter and John Shaw, and the solicitors for the company. Most of the points raised were satisfactorily settled by agreement between the two firms, but it transpired that the two brothers had disposed of some of their assets which remained at the date of the Terms of Settlement to enable them to settle certain claims of the revenue authorities, and they wanted a clause in the deed, the draft of which was under consideration, relieving them from responsibility, and they refused to sign the deed, as it was not within their power to charge their assets as they were at the date when the Terms of Settlement were signed, or even as they were when those terms were approved by the company. They undoubtedly committed a serious breach of the Terms of Settlement.

At this time, pursuant to the company's articles as they had been altered in accordance with the Terms of Settlement, the directors consisted of two categories—permanent directors and ordinary directors. The permanent directors were Ernest Farrell, Charles Halliday and Mark Wheatley Jones; the ordinary directors were Peter Shaw, John Shaw, Percy Shaw, John Bryan Shaw, and James Fitzgerald Fern. John Bryan Shaw was a son of the appellant John Shaw.

On March 16, 1934, the three permanent directors held a meeting, to which none of the ordinary directors were summoned. The permanent directors carried a resolution by two to one to instruct the company's solicitors to issue the writs in this action. Accordingly the solicitors caused two specially indorsed writs to be issued. The statement of claim indorsed on the writ in the action against Peter Shaw was in the words following: "The plaintiff's claim is 11,483*l.* 4*s.* upon an account stated between the plaintiffs and the defendant. Particulars: December 31, 1932: To amount found and admitted by the defendant to be due to the plaintiffs as shewn by the plaintiffs' balance-sheet of this date 11,483*l.* 4*s.* Amount claimed 11,483*l.* 4*s.*" The statement of claim in the action against John Shaw was similar except that the amount claimed was 15,088*l.* 18*s.* 9*d.*

The defendants answered the claim in two ways. They contended (1.) that the facts as proved or admitted failed to establish a cause of action for money due under an account stated or any cause of action whatsoever. (2.) That the permanent directors had no authority to commence the action on behalf of the company, and as the company were therefore not before the Court no judgment could be given in their favour.

I deal first with the second of these contentions. No objection was taken at the trial that the Court could not decide the second point on the ground that it is not a matter of defence, but only a ground for a motion to stay the action and make the unauthorized individuals and the solicitors pay the costs, and the question of authority was fully argued and decided by the trial judge in the plaintiffs' favour.

In the appeal, however, counsel for the respondents did contend that the Court was bound in law to refuse to consider the question whether the action was instituted by the authorized agents of the company. As will be seen presently, I am of opinion that the action was commenced and carried on by the authority of agents clothed with authority by the company's articles, and that the meeting of the shareholders on April 30, 1934, had no power to order the chairman to instruct the solicitors to discontinue the actions. If this be right the preliminary question whether this Court is entitled or is not entitled to decide the question of authority does not arise, but as my view as to the meaning and effect of the relevant articles may not be accepted, I propose to say something about the preliminary question whether the Court can entertain the question at all.

In my judgment neither Lord Cave nor Lord Atkinson nor Atkin L.J., by what they said in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1),

(1) [1925] A. C. 112; [1923] 2 K. B. 630.

intended to lay down as a rule of law that when it is clear from the evidence given in an action that the supposed plaintiff did not authorize the bringing of the action, the Court is bound to allow the action to go on to judgment, and thereby allow judgment to be obtained in favour of a person or company, ex hypothesi not present in Court and not asking for a judgment, or against a person or company who have not been served with process and have never instructed any one to appear on their behalf.

I understand *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1) to be a decision to the effect that where the Court is informed of facts which prove conclusively that the solicitors had no authority to bring the action, the action should be struck out. The want of authority was established by the failure of proof that the Continental Company had before the war clothed the English secretary with authority to commence actions on their behalf, and the incapacity of the enemy directors in whom authority to bring actions was vested after the war had begun, made it clear to demonstration that the action was unauthorized.

In *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (2) the Court held that the evidence established that the English representative of the Russian corporation had authority to bring the action, but Lords Cave and Atkinson and Atkin L.J. went beyond what was necessary to decide the case and expressed the opinion that the point of want of authority could not be raised by way of defence, but ought to be raised by notice of motion to stay or dismiss the action. These observations do not, in my judgment, mean that if the facts actually put in evidence prove that the solicitors commenced the proceedings without any authority from the named plaintiff, the Court ought to ignore those facts, and give judgment in favour of or against a party who ex hypothesi is not present in Court. In my opinion the Court has inherent jurisdiction to say " as it is clearly established that the action has been brought by solicitors who were not authorized by the named plaintiff to bring it, we will strike it out." They would not then be entitled to award costs against the nominal plaintiff, nor would they as a rule make any order that the solicitor should pay the costs, but would leave these matters to be determined on a motion to which the solicitors would be parties. On the other hand, if the question of authority were left in doubt, the right course for the Court to take would be to try the action, and give judgment according to the evidence, leaving the losing party to apply to set aside the judgment on the ground that he had never authorized the action or the defence, as the case might be.

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(1) [1916] 2 A. C. 307. (2) [1925] A. C. 112; [1923] 2 K. B. 630.

In the present case in the view I take of the company's new articles the preliminary point does not arise. Articles 86A and 87 of the articles are couched in the negative. In form they say what powers the three brothers and the ordinary directors shall not have, but they necessarily have the same meaning they would have if framed in a positive form. Article 86A restricts the rights and duties of the three brothers, and prohibits them as directors from dealing on behalf of the company with any of the debts due from them under the Terms of Settlement. It has the same effect as it would have had if it had said "the directors other than the three brothers shall alone have power on behalf of the company to control the conduct of the company with regard to such debts, and the sole right to deal with them." Article 86A alone would not have had the effect of excluding the two additional directors, John Bryan Shaw and James Fitzgerald Fern, from control over or from dealing with these debts, but article 87 has a wider effect than 86A. This article applies to all the ordinary directors, and not only restricts their rights at directors' meetings to vote in respect of, but it also provides that they shall have no control over, the financial affairs of the company, and that they shall only have such rights of voting and such control over the management as may from time to time be conferred upon them by the permanent directors. The effect of this article is the same as it would have been if it had provided that the power of control over the financial affairs of the company, and all powers of management of the affairs of the company, except such as might from time to time be conferred upon the ordinary directors by the permanent directors, should be vested in the three permanent directors alone. The effect of these articles may be illustrated by saying the same result is achieved if you say 8 minus 5, as if you say 3. There is no evidence that any, or, if so, what powers of management had been conferred on the ordinary directors by the permanent directors.

In my judgment on March 23, 1934, when the permanent directors decided to instruct the company's solicitors to bring these actions on behalf of the company, they had power under the articles to do so. The power was not in the board of directors but in the permanent directors. The ordinary directors were not entitled to any say on the question, which was the only one considered at the meeting. If they had been summoned and had come to the meeting they could have been directed by the permanent directors to retire and could not have refused.

It seems to me in any case to be carrying technicality to an absurd length to say they ought to have been summoned to the meeting in order that they might be directed to retire. I do not, and am not entitled to differ from the decision of this Court in *Young* v. *Ladies' Imperial Club, Ld.* (1) and *In re Portuguese Consolidated Copper Mines, Ld.* (2) Those decisions mean that a meeting of directors having power to make a decision on a given matter is invalid if one of the directors entitled to take part has not been summoned. The decisions have no relation to the question we have to determine.

It was further argued that the power of the permanent directors to institute actions on behalf of the company was so restricted by article 121A that it did not extend to the present actions. I fail to appreciate the force of this argument. Assuming that an agent's authority to bring actions is established, the principal is bound by what the agent does within the scope of his authority. The fact that the action is one that cannot succeed does not limit the authority of the agent, though it may give the principal a right to complain of the conduct of his agent and to recover damages from him for his breach of duty as agent. Further, in this case the action was not brought for money due under the terms of settlement, or for money due under article 121A. The action was based on a cause of action which arose out of the defendants' signature to the balance-sheet, and this cause of action, whether likely to succeed or not, was one in respect of which the permanent directors were, in my opinion, empowered to commence and carry on.

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(1) [1920] 2 K. B. 523.

(2) (1889) 42 Ch. D. 160.

I am therefore of opinion that the learned judge was right in refusing to dismiss the action on the plea that it was commenced without the authority of the plaintiff company. I think the judge was also right in refusing to give effect to the resolution of the meeting of the shareholders requiring the chairman to instruct the company's solicitors not to proceed further with the action. A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders. The law on this subject is, I think, accurately stated in Buckley on Companies as the effect of the decisions there mentioned: see 11th ed., p. 723.

For these reasons I am of opinion that the Court ought not to dismiss the action on the ground that it was instituted and carried on without the authority of the plaintiff company.

It remains for me to consider whether the action ought to have failed on other grounds. I am satisfied that judgment should have been given for the defendants on the ground that no cause of action for money due on an account stated was established by the proved or admitted facts. If the balance-sheet could in any sense be treated as an account stated, I am inclined to think that it would be one of the second class of cases referred to by Lord Cave in *Camillo Tank Steamship Co.* v. *Alexandria Engineering Works* (1), but it is unnecessary to decide this point because, for reasons I am about to state, I think the balance-sheet was not an account stated at all, either of the first, second or third kind mentioned by Lord Cave.

I am of opinion, first, that the balance-sheet was not an account stated between the company as creditors, and accepted by the appellants, so as to involve a fresh promise to pay the amounts stated at debit of the defendants, and secondly, if it be an account stated in the sense of an admission by a debtor or an agreement to pay a balance of account, the only promise to pay which can in the circumstances be implied is a promise not to pay in præsenti, but a promise to pay in twenty years' time.

As to the first point, the balance-sheet was not an account rendered to the appellants by the company as creditors and accepted by the appellants as debtors. It was a statement by the company of the state of their assets and liabilities. As such a statement it was inaccurate, but though by signing it the directors who signed and those who did not sign but agreed to the presentation of the balance-sheet to the shareholders vouched its accuracy, this did not make it a debtor and creditor statement between the company and the appellants. It was not signed by the appellants in their personal capacity, it was so signed on behalf of all the directors as a statement by the directors to the shareholders of the state of their assets and liabilities. It was not a contract by the company to accept in place of the 47,226*l.* 18*s.* 3*d.*, to which they were entitled in twenty years' time from the two appellants, the sums debited to them in the balance-

(1) 38 Times L. R. 134, 145.

sheet. Nor was it a contract by the two appellants severally to pay immediately the sums debited to them in the balance-sheet. It was only an inaccurate statement by the board of the assets of the company, which might have landed them in difficulties and liabilities to shareholders who suffered damage by acting in the belief that the statements in the balance-sheet were true. I have, however, very little doubt but that most, if not all, of the shareholders knew the real state of the facts. The company was a family concern.

As to the second point, all the directors knew at the time the balance-sheet was signed that it was not intended in any way to alter the effect of the Terms of Settlement. It falls to be interpreted in the light of the surrounding circumstances, and if the appellants can be treated as making any promise to pay, such promise is implied and not express, and in the light of the surrounding circumstances it should have been held to be a promise to pay in twenty years, and not a promise to pay immediately.

For these reasons the action should have failed, and it seems unnecessary to deal with the respondents' contention that when the writ was issued the settlement agreement had ceased to be binding by reason of the appellants' inability to grant the agreed charges on their assets, and their refusal to sign the deed. This is not a case of repudiation before the date of performance has arrived. When the appellants refused to perform the terms of the contract that still remained, i.e., to give the agreed charges, and to sign the deed, the greater part of the agreement had been already performed by the appellants, and the company had had the benefit of the terms so performed. All the terms numbered 1 to 8 inclusive had been effectually carried out. Peter Shaw had given up his exceptional powers as governing director, the articles had been altered so as to deprive the ordinary directors of such powers of management as they previously had, and to leave their powers subject to the discretion of the permanent directors. It is possible that the company might have been entitled to rescind the contract, by reason of a breach of a fundamental term, but they could not continue to retain the benefits of the agreement so far as it had been performed and at the same time insist that the agreement was no longer binding on them. It does not seem reasonable or just that the permanent directors should exercise the power to commence and carry on an action which they never would have had if the terms of settlement had not been agreed to, while at the same time saying the other contracting parties have ceased to have any right to the benefits conferred by the agreement. They cannot exercise the powers given to them by articles 86A and 87 and successfully contend that the appellants were not entitled to the suspension of liability for twenty years provided for under the Terms of Settlement, and in article 121A, which continued to operate as one of the articles of association of the company.

For these reasons I am of opinion that the appeal succeeds, and judgment should be entered for the appellants against the company.

SLESSER L.J. In this case the material facts have been stated by Greer L.J. in his judgment and on them two fundamental questions fall to be decided. First, the initial question whether the plaintiff company have shown any title in the circumstances of the case to sue at all and, secondly, if they are before the Court, whether their claim is well-founded.

The action is brought against two defendants, John and Peter Shaw, who were at all material times directors of the plaintiff company, for amounts said to be found and admitted by them to be due upon accounts stated between the plaintiff company and the defendants respectively. The sums claimed in each case differ, but the issues in the two cases are identical; the actions have been consolidated and have been treated throughout as one matter.

The procedural grounds upon which the appellants contend that the "action is altogether irregular and should be struck out" (to use the language of Lord Parker in the *Daimler Co.* case (1)) are three in number: First, they say that the persons who authorized the issue of the writs on behalf of the company had no power in the circumstances so to act, in that they purported to act as, but were not, a meeting of the directors, who alone could exercise such power; secondly, they say that under the articles, in particular article 95, the power of the directors to do, on behalf of the company, all such acts as the company might do is limited in that they must act in a manner subject to the articles and that the amended article 121A of the articles of association expressly excludes such an action at law as was here taken, and, thirdly, they contend that, by reason of a resolution passed by the shareholders at an extraordinary meeting on April 30, 1934, directing the chairman of directors to instruct the company's solicitors to discontinue the action forthwith, thereafter, whatever authority the directors or any of them had to bring or continue the action was determined. To all these objections, Mr. Lynskey argues that, in any event, the whole matter cannot properly be raised as a defence in these proceedings.

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(1) [1916] 2 A. C. 307, 348.

I propose to deal with these contentions seriatim: First, as to the authority of the persons who started the actions to act for the company: under the articles of association, as amended on August 18, 1932, there are constituted by article 84, eight directors, of whom three hold office as permanent directors, and five are ordinary directors. The permanent directors were a Mr. Farrell, Mr. Halliday and Mr. Jones. These three alone were summoned to a meeting at Mr. Farrell's office some time before the issue of the writ, when the actions were then decided upon and solicitors instructed by a majority vote of Mr. Farrell and Mr. Halliday, Mr. Jones dissenting. The five ordinary directors who were, admittedly, not summoned or present, consisted of the defendants, their brother Percy Shaw and two other gentlemen—Mr. John Brian Shaw and Mr. James Fitzgerald Fern.

I entertain no doubt that if it was necessary under the articles that a valid decision to bring an action must be arrived at at a meeting of the directors, that no such meeting was then held, by reason of the failure to summon the ordinary directors. The authority, if authority be needed for such a conclusion, is to be found in the case of *In re Homer District Consolidated Gold Mines* (1), where, on a failure to summon certain directors to a board meeting, North J. said (2): "I come to the conclusion that what was done on that occasion was not the act of the board of directors, and did not bind the company." *In re Portuguese Consolidated Copper Mines Ld.* (3), and on the same principle, in this Court, *Young* v. *Ladies' Imperial Club, Ld.* (4), are to the same effect. As was stated in *D'Arcy* v. *Tamar, &c., Ry. Co.* (5): "it is quite clear that the directors are to act together, and in a meeting": per Martin B.

But the argument in this case proceeds upon another footing, for it is said that the peculiar powers conferred upon the permanent directors by these articles and the exclusion of the ordinary directors from all the management of the affairs of the company, enabled the permanent directors to authorize the starting of proceedings as a part of their exclusive powers.

It therefore becomes necessary to examine in some detail what powers are so given to the permanent directors to the exclusion of the ordinary directors. It is clear from article 111, as amended in the revised articles of August 18, 1932, that it is contemplated that at a board meeting the ordinary members shall normally have the right to attend, for it is there provided that "no board meeting shall be held unless at least one permanent director is present" and further that the chairman and vice-chairman being absent, "the remaining permanent director shall be chairman." This may be construed in connection with article 109, which provides (inter alia) that "Unless otherwise determined two shall be a quorum, and in the case of an equality of votes, the chairman shall have a second or casting vote." So that at a board meeting it is clearly contemplated that ordinary members have a right to attend and constitute a part of the board.

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(1) 39 Ch. D. 546.
(2) Ibid. 551.
(3) 42 Ch. D. 160.
(4) [1920] 2 K. B. 523.
(5) L. R. 2 Ex. 158, 161.

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The articles which give special powers to the permanent directors must next be considered. Under article 95 of the original articles it was provided that, generally subject to the powers of the governing director under articles 89–92, the business of the company should be managed by the directors. By article 93, the directors might, from time to time, appoint some of their body to be managing directors and vest such of the powers as were in the directors in the managing directors on such terms as they might think fit. By the amended articles, articles 89–92 as to the governing director were cancelled, but not article 95, the provisions of which, however, became subject to the amending articles 86A and 87. Article 86A is concerned only with the two defendants and their brother, Mr. Percy Shaw. Article 87 concerns all the ordinary directors, that is to say, in addition to those three gentlemen, it affects Mr. John Brian Shaw and Mr. James Fern. It is convenient to consider article 87 first, because, if the permanent directors had no authority to authorize these proceedings without inviting John Brian Shaw and James Fern to their meeting, it must follow, subject to matters still to be considered, that the authorization would be defective, apart altogether from the special cases of the two defendants and their brother Percy Shaw. I do not find that the learned judge in his judgment deals with the cases of Mr. John Brian Shaw and Mr. Fern at all. They had no interest in any of the debts due from Peter, John and Percy Shaw to the company, which are dealt with under article 86A, and the observations of Farwell J. in the *Greymouth* case (1) as to their being " interested against the company " can have no application to them on any general principle and, if they could be excluded, it could only be by reason of the specific provisions of article 87.

Article 87, so far as it is here material, provides that: " the ordinary directors . . . . shall have no right at directors' meetings to vote in respect of, nor shall they have any control over, the financial affairs of the company, and with regard to the management of the company's business they shall have only such rights of voting and such control over the management as may from time to time be conferred upon them by the permanent directors." In fact the permanent directors did not at any time confer upon them any rights of voting or control over management. So that, in the result, the ordinary directors have no vote either on financial affairs or the management of the company's business. But it is to be noticed that it is at a directors' meeting, which for the reasons I have given they would be entitled to attend, and the article provides that they are debarred from the right to vote. Article 87 appears to contemplate their presence, but a limitation of their powers at such a meeting. So far as regards a directors' meeting, I cannot see why they are not entitled to attend and do all things at such meeting, except vote, in respect of the financial affairs of the company or the management. Thus article 118, as amended, for example, seems to assume their presence, if one permanent director is also present, under article 111, to authorize the affixing of the seal to an instrument.

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(1) [1904] 1 Ch. 32, 35.

Article 86A, which I have postponed for consideration, further provides that Peter, John and Percy Shaw as directors, shall have no right to deal with, on behalf of the company, any of the debts due from them mentioned in certain terms of settlement, but this does not apply, as I have said, to John Brian Shaw or to James Fern. I think that these two directors, at any rate, by consultation, exhortation or opposition, were entitled to endeavour to influence the minds of the permanent directors although they themselves had no franchise.

But next, it may be said that their exclusion from the management of the company's financial affairs and business enabled the permanent directors as part of their management, outside altogether of a directors' meeting, irrespective of voting, to authorize these proceedings. I cannot agree. In fact, in this case, the decision was taken by voting with a division of opinion at what appears to have been regarded by those present as a directors' meeting. Mr. Halliday calls it a meeting of the permanent directors and the learned

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judge seems to regard it as a purported directors' meeting. In any event, article 95, subject to its consequential alterations, is still extant, and that article distinguishes between the business of the company which is to be managed by directors and the exercise of powers and doing of acts on behalf of the company by them.

In article 87 of the amended articles, a distinction is drawn between management of the business and control over the financial affairs, and the proper way to regard such a power as the power to authorize actions on behalf of the company is, I think, to hold that such powers can only be exercised by the directors at such a proper meeting. In *John Morley Building Co.* v. *Barras* (1) I read the judgment of Stirling J. to indicate that the directors as such are the proper persons to authorize proceedings in the name of the company; for a motion having been instituted in that case on the ground that an action in the name of a company had been instituted without the authority of the applicants, he said (2): " The real applicants are, no doubt, the defendants, and I have to decide whether they have been appointed directors of the company."

For these reasons, I think that this first ground succeeds and that this action was improperly started for want of authority of the directors.

But, secondly, if the action was competent to the permanent directors to authorize, it is said that their powers were limited by article 121A, which provides that " all dividends payable on the ordinary shares held by Peter Shaw, John Shaw and Percy Shaw " (the first two being the defendants) " shall be retained by the company on account of the debts mentioned in the said terms of settlement until the said debts are liquidated," and, " Except as above provided, the said debts shall not be called in . . . . for a period of twenty years from the date of this resolution except in the event of a creditors' winding-up." In my view, if the present action were one for calling in the debts which has been brought within twenty years of the passing of the resolution amending the articles, it is one of the matters which might arguably be excluded from the powers of the directors under article 95 and under the amending articles 86A and 97, but if the present action on the account stated is not a calling-in of the debts, this argument does not avail. In form it is certainly not such an action, and if the respondents' case is well founded it is an action on an account stated, which is a separate cause of action: 2 Williams' Saunders, 122; *Irving* v. *Veitch.* (1) The appellants, on this head, are in a dilemma, for if the action is well-founded on an account stated, it is not a mere calling-in of the debts, and article 121A would not limit the powers of the permanent directors, if otherwise they have them, to bring the action. If, on the other hand, the action does not succeed on the account stated, the point does not arise. I think, therefore, that this ground of objection to the action fails.

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(1) [1891] 2 Ch. 386.

(2) Ibid. 391.

As to the third ground of want of authority, that the shareholders instructed the directors to discontinue the action on April 30, 1934: If the permanent directors had power under the articles to bring the action, I do not see how the shareholders could interfere with that power, otherwise than by altering the articles which they have not proposed to do. This would seem to be the effect of the decision of the House of Lords in *Quin & Axtens, Ld.* v. *Salmon* (2), though the decision of Neville J. in *Marshall's Valve Gear Co.'s Case* (3) is difficult to reconcile with that case. However, I do not think it necessary in the present circumstances to decide the point finally, but I incline to the view that article 95 in matters within the powers of the permanent directors would require an alteration of the regulations by special resolution to prevent this action continuing; that is to say, that Lord Loreburn's dictum in *Quin & Axtens'* case (2) is correct that the words "regulations" and "articles" in the articles in that case, which were substantially similar to the present article 95, mean the same thing: see also *Logan* v. *Davis.* (4)

(1) (1837) 3 M. & W. 90.
(2) [1909] A. C. 442.
(3) [1909] 1 Ch. 267.
(4) (1911) 104 L. T. 914.

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To summarize, therefore, on this head, I think that the appellants are right on their first ground that the permanent directors, in that they failed to summon to their meeting the ordinary directors, were incompetent to pass the vote to authorize proceedings in this case, and so find it unnecessary to conclude finally on the second or third propositions.

My view thus being that the action is misconceived, because the directors have not authorized its institution, Mr. Lynskey argues, in reply, that, even if this be right, this Court has no power "to strike out and discharge the action," because the defendants failed properly to proceed by motion to ask for this relief and relied upon their pleading in defence in this case and the argument before the judge, which is not the right way to raise the matter. His difficulty in this contention is not rendered easier by the fact that the learned judge has, on the invitation of both sides, considered this aspect of the case in his judgment, has dealt with it and decided in Mr. Lynskey's favour, holding that the action was authorized.

The various dicta in the authorities as to the methods open to a defendant to contest the authority to bring an action are not altogether easy to reconcile or understand, but, having come to a conclusion in this case on the matter, I think it right to express it. There is no doubt that the *Daimler* case (1) is authority, if one be needed, that an action can be struck out if it be brought in the name of a company which is incompetent to authorize its agents to give a retainer. The majority of the House in that case did not decide that the respondent company was incapable of suing, though that was the view of Lord Halsbury, but that the action was commenced without authority and that the directors were incapable of acting, being, all but one, enemy aliens and that they could not therefore properly authorize their secretary to bring the action. But also it has been decided in the case of a non-extant company that an action could not be defended: *Simmons* v. *Liberal Opinion, Ld. In re Dunn.* (2) But here it is argued that a different position exists, that the company is admittedly incompetent and that at most, it may be said that authority, though it might have been given, in fact was given by the directors to sue, was not given on this matter. Mr. Lynskey relies upon the judgment of Atkin L.J. in *Russian Commercial and Industrial Bank* (1) (approved in the House of Lords, per Lord Atkinson (2)), adopting and approving the words of Warrington J. in *Richmond* v. *Branson & Son* (3), to the effect that "the real question is the authority of the solicitor. Is that a question which can be raised as a relevant issue in the action and at the trial? . . . . The business of this Court could not be carried on if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shown not to exist in the proper form of proceeding, *namely, a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority.*" The italics are my own. Atkin L.J. continued—in the *Russian Bank* case (4)—"The *Daimler* case (5) does not appear to be inconsistent with this view. That was a case where no retainer could be given at all, and in such a case the Court may very well refuse to hear the action on being informed of the facts."

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(1) [1916] 2 A. C. 307.

(2) [1911] 1 K. B. 966.

In my view, the reasons for the conclusion of the House of Lords and of Atkin L.J. in the *Russian Bank* case (2), (4) and of Warrington J. in *Richmond* v. *Branson* (3) were that in those cases questions of fact on which it needed to be decided whether there was or was not authority had to be considered, and the Court declined to go into such matters of evidence except upon a substantive motion. But the rights of the Court in its inherent jurisdiction to stay actions which would be an abuse of its process if they are not properly upon the record, either because the plaintiff was not existent at the time of the issue of the writ or because they are satisfied on the facts that he had not authorized the proceedings, has so far been undoubted, and this, altogether apart from the desire of either party, if the facts are before the Court. Where the Court may properly come to a conclusion on sufficient or admitted evidence that there is no action properly before it, it may well think it right to act in accordance with that inherent jurisdiction, to refuse to proceed, and the difference which has been sought to be found between the case where no retainer could be given at all, and the case where what is still in dispute is whether in fact there was or was not authority to give one is not a difference in principle, but a difference of expediency, depending upon whether a Court is or is not so informed of the facts that it does or does not think it right to come to a conclusion on the matter as a question of law.

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(1) [1923] 2 K. B. 630, 672.
(2) [1925] A. C. 112, 148.
(3) [1914] 1 Ch. 968, 974.
(4) [1923] 2 K. B. 672.
(5) [1916] 2 A. C. 307.

In the present case, as I have said, the facts which have been found by the learned judge are before the Court; they show, to my mind, a complete absence of authority of the company to sue in this action. In other words, I have come to the conclusion that the company is not before the Court at all, and that, therefore, for this reason, the appeal succeeds and the action must be struck out; but as there is no one who is before the Court who can be made liable for costs, the appellants if they desire costs must pursue such other remedies in other proceedings on this head as they may think advisable.

In these circumstances, I have not thought fit to deal with the merits of the case, but in case this action should go further I would say that if I am wrong in my view as to the incapacity of the company to sue, I agree with the views of the Lords Justices that the action on the account stated must fail for the reasons by them given.

In my view this appeal should succeed without costs here or below, but as this is not the opinion of the majority of the Court, judgment will be as they decide.

ROCHE L.J. I agree that this appeal should be allowed. As to the substance of the matter, that is to say, whether assuming the action to be properly brought the plaintiff company is entitled to succeed, I agree with the conclusion arrived at by the Lords Justices who have given judgment.

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There was, in my opinion, no such account stated between the parties as was alleged and relied upon by the plaintiff company. I have nothing to add to the reasons assigned by Greer L.J. for this conclusion.

As to the preliminary question whether the plaintiff company was properly before the Court, that is to say, whether the action was instituted and carried on with its authority, I have arrived at the same result as Greer L.J., but for different reasons, which I propose briefly to state.

I agree with both the Lords Justices as to the result of the decided cases and particularly of the *Daimler* case (1) and of the *Russian Commercial Bank* case. (2) The principles to be derived from them are that such an objection to a right to sue as is here taken should be taken not at the trial but by an interlocutory motion or summons; that if such procedure is not adopted the Court need not, and ordinarily should not, entertain such an objection at the trial as if it were a defence. If it were otherwise, then for reasons pointed out by Warrington J. in *Richmond* v. *Branson* (3), the position of the Court would be well nigh intolerable. Nevertheless, as appears from the decision in the *Daimler* case (1), if want of capacity or authority to sue plainly appears at any stage the Court may then strike out the action.

It was argued for the respondents that the application of the latter principle was limited to objections based upon want of capacity to sue and did not extend to objections based upon want of authority to sue. I see no reason for such limitation of the powers of the Court, and in my opinion the argument is not well founded. When it clearly appears that there is want of authority to sue, e.g., if an admission in that sense were made in the course of the hearing, the same result in my opinion ought to follow and the action in question ought to be struck out.

In the present case the defendants did not proceed by motion or summons but pleaded the matter in their defences, and the learned judge, apparently without objection from

(1) [1916] 2 A. C. 307.

(2) [1923] 2 K. B. 630; [1925] A. C. 112.

(3) [1914] 1 Ch. 968.

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the plaintiffs, adjudicated upon the matter at the trial, and reached an affirmative conclusion adverse to the defendants, as has Greer L.J. upon the hearing of the appeals. Speaking for myself, I do not find materials for reaching such an affirmative conclusion, and before feeling myself able to adhere either to the opinion of the trial judge and Greer L.J. or to the contrary opinion of Slesser L.J., I should require more information as to several facts which, as it seems to me, might make all the difference in the decision of a point where the balance rests so even.

The case was left at the trial singularly bare of such evidence, and the minute books do not seem to have been produced. I will mention in support of my view only one matter. The Court does not know whether before the meeting at which these actions were decided upon, the permanent directors had conferred any, and, if so, what, powers upon the ordinary directors, nor does it know whether the meeting purported to be a meeting of directors and appeared as such in the minute book or whether it was in form, as well as in fact, a meeting of permanent directors on a matter within a class of matters previously excluded by them from the purview of the ordinary directors. It appears to me that such information and other similar information has or may have a bearing on the right of the ordinary directors to be summoned to attend the meeting. The result of this reasoning is that by a different road I reach the same result as Greer L.J., and it follows that, with great respect to Slesser L.J., I am unable to concur in his affirmative conclusion in favour of the defendants upon this point.

In short, in my opinion, this is a case where, apart from the nicety of the matters of law and constructions involved, the Court has not, with regard to matters of fact, the information necessary for a decision whether effect should be given to this objection of the defendants to the competence of the actions. The onus was upon the defendants and they have failed to satisfy me clearly or at all that the objection is a good one.

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Accordingly, I agree with Greer L.J. as to the form of order he proposes.

Appeal allowed.

Solicitors for appellants: *Gregory, Rowcliffe & Co., for Richard Hilditch & Son, Manchester.*

Solicitors for respondents: *Patersons, Snow & Co., for Wilson, Wright, Earle & Co., Manchester.*

J. S. H.

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Landlord and Tenant—Rent Restrictions Acts—Premises to which Acts ceased to apply before July 18, 1933*—Non-registration within three months of that date—Apportionment order—Subsequent certificate of reasonable excuse for delay—Effect of application to register—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 3*—Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 1*—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 2.

The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 2, sub-s. 2, enacts: "If the landlord of any dwelling-house let as a separate dwelling immediately before the passing of this Act, being a dwelling-house of which the rateable value on the appointed day did not exceed the respective amount mentioned in the last foregoing sub-section, claims that by virtue of the provisions of the said section two of the Act of 1923 the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, he shall within three months after the passing of this Act make to the council of the county borough or county district in which the dwelling-house is situated application in the prescribed form for the registration of the dwelling-house, and if in any proceedings with respect to any dwelling-house which is, or immediately before the passing of this Act formed part of, such a dwelling-house as aforesaid, it is proved that but for the provisions of the said section two of the Act of 1923 the principal Acts would have applied to the dwelling-house and that no such application has been made by or on behalf of the landlord within the time aforesaid, the dwelling-house shall, subject as hereinafter provided, be deemed to be a dwelling-house to which the principal Acts apply: Provided that if, on application to the county court of the district in which the house is situated, the court certifies that there was reasonable excuse for the failure to make application for the registration of the dwelling-house within the time aforesaid and application for registration is made within seven days after the certificate has been granted, then, if the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, section two of the Act of 1923 shall, notwithstanding anything in the last foregoing sub-section, apply to the dwelling-house as from the date on which the application for registration is made."

Where a landlord who has failed to apply within three months of the passing of the Act of 1933 for registration of a dwelling-house of a rateable value not exceeding the amounts mentioned above which had become decontrolled under s. 2 of the Rent and Mortgage Interest Restrictions Act, 1923, obtains a certificate that there is reasonable excuse for the delay and within seven days thereafter applies for and secures the registration of the premises, the premises become decontrolled premises as from the date of the application for registration, notwithstanding that in the interval after the expiry of the three months' period part of the premises had been let to a tenant who had obtained an apportionment order under s. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

Aronson v. *Barker* (Estates Gazette for Oct. 27, 1934) considered and explained. *Stokes* v. *Little* [1935] 1 K. B. 182, 194 applied.

APPEAL from Wandsworth County Court.

On June 25, 1933, the statutory tenant of 28 Parma Crescent, Battersea, of which the plaintiffs were the landlords, vacated the premises, leaving a sub-tenant of the first floor who was protected by the Rent Restrictions Acts. The premises consisted of two floors only, and a fortnight later the sub-tenant moved to the ground floor and vacated the first floor, with the result that by that date the whole of the premises had become decontrolled by virtue of the Rent and Mortgage Interest Restrictions Act, 1923, s. 2. (1) In

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(1) The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 3, provides: "Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive."

The Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1, September, 1933, the tenant of the ground floor vacated it, and on September 25, 1933, the landlords let the whole premises to a tenant who vacated them on June 18, 1934. On July 2, 1934, the landlords let the ground floor to the defendant at a rent of 1*l.* a week. The landlords having failed to register the premises as decontrolled under s. 2, sub-s. 2, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, within three months of the passing of that Act, on July 18, 1933, the premises had become controlled, and on October 3, 1934, the defendant applied under s. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1), to have the rent of the whole premises, which was taken to be the amount of the rateable value as on August 3, 1914, apportioned, and on October 9, 1934, an order was made fixing the apportioned part of the rent attributable to the ground floor at two-fifths of the entire rent of 32*l.* per annum, that is, at 12*l.* 16*s.* per annum. The result was that the defendant was only liable for a reduced rent as from the beginning of the tenancy. On October 11, 1934, the landlords applied for and obtained a certificate that there was reasonable excuse for the failure to register the premises within three months of the passing of the Act of 1933, and within seven days they secured the registration of the premises as decontrolled. On October 22, 1934, the landlords gave the defendant a week's notice to quit, and on his failing to comply brought these proceedings for possession.

The county court judge made an order for possession.

The defendant appealed.

W. R. Lawrence for the appellant. The premises are still

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provides: "Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house."

(1) See note (1) ante, p. 150.

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controlled premises under the Rent Restrictions Acts, and an order for possession ought not therefore to have been made. As soon as the order apportioning the rent was made the part of the premises occupied by the appellant became controlled premises, as the landlords had failed to register the premises as decontrolled premises in accordance with s. 2, sub-s. 2, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. That order operated in rem and made the premises controlled premises : *Aronson* v. *Barker.* (1) The effect of the decision that the apportionment order operated in rem is shown by *Wakefield Corporation* v. *Cooke* (2) to be that the question in issue has been finally and absolutely determined. The construction to be applied to s. 12, sub-s. 3, of the Act of 1920 is stated in *Barrett* v. *Hardy Brothers* (*Alnwick*), *Ld.* (3), and the result of the apportionment order is that there is a final and conclusive decision that the part of the premises occupied by the appellant are controlled premises. The subsequent registration of the premises under s. 2 of the Act of 1933 cannot affect this result, and *Stokes* v. *Little* (4) is distinguishable on the ground that there was here an apportionment order.

Salter-Nichols for the respondents. *Stokes* v. *Little* (4) decides definitely that when after obtaining a certificate that there was reasonable excuse for the delay in registering property decontrolled under the Rent and Mortgage Interest Restrictions Act, 1923, registration is obtained, the property becomes decontrolled as from the date of the application to register. The obtaining of the apportionment order cannot affect this. The apportionment order was properly obtained, because after the failure to register within three months of the passing of the 1933 Act the property must be regarded as controlled, but its effect could only prevail during the interval between the beginning of the tenancy and the date of the application to register after certificate obtained.

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(1) Estates Gazette for Oct. 27, 1934.

(2) [1904] A. C. 31, 36.

(3) [1925] 2 K. B. 220.

(4) [1935] 1 K. B. 182.

[LORD HANWORTH M.R. The difficulty is to apply *Stokes* v. *Little* (1) in the light of *Aronson* v. *Barker*. (2)]

The circumstances are different from those in *Aronson* v. *Barker* (2) in that there has been here a change of circumstances since the apportionment order, consisting of the registration of the premises which under the Act of 1933 operates to decontrol the premises as from the date of the application.

W. R. Lawrence replied.

LORD HANWORTH M.R. This appeal raises a point of great difficulty under the Rent Restriction Acts. I have with some diffidence and some reluctance come to the conclusion that the appeal fails, but I should certainly not complain if somebody else found it difficult to follow my reasons. I think that we have to bear in mind that this Court desires to be, and, indeed, must be loyal to previous decisions of this Court.

I will state the facts with which we have to deal. The defendant is the tenant of the ground floor of 28 Parma Crescent. At one time the landlords obtained complete possession of the premises, with the result that they became decontrolled. On July 2, 1934, they let the ground floor to the defendant at a rent of 1*l.* a week, and their letting it at that rent connoted that the premises were at that time decontrolled, as that rent was in excess of the standard rent which could be charged by a landlord to his tenant for these ground-floor premises.

On October 3, 1934, the defendant applied to the county court for apportionment under s. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. [His Lordship read the sub-section.] On October 9 an apportionment order was made which under the sub-section was final and conclusive inter partes, and that was that the rateable value of the house, which was taken to be the standard rent, being 32*l.*, the standard rent chargeable in respect of the ground-floor premises was to be two-fifths of that sum—that is, 12*l.* 16*s.*, and no more. During the time that the tenant had been occupying the premises between July 2 and October 9

(1) [1935] 1 K. B. 182. (2) Estates Gazette for Oct. 27, 1934.

there had been payments, or, at any rate, a liability, up to the full amount of 1*l.* a week. In view of the apportionment the rent payable on the footing that the premises were controlled premises was much under that sum, and in so far as the tenant had paid the larger sum he would, on the apportionment order being made, be able to recover from the landlords the amount in excess of the sum which he ought to have paid.

The apportionment order must, on the authority of *Aronson* v. *Barker* (1), a case decided in this Court, be taken to be an order to which the principles of *Wakefield Corporation* v. *Cooke* (2) applied, so that it was to be treated as a decision in rem on the house, the house being the res. But it must be considered whether that order was something which applied for ever to the premises, or whether it applied only until some supervening event happened which prevented its continuance and permanence. Such events may arise under the Act of 1920, as, for instance, when there is a reconstruction of the premises as contemplated by s. 12, sub-s. 9, or an alteration of the use of the premises. Both those changes are contemplated by the Act of 1920 as altering the control of the house and in effect decontrolling it. Inasmuch as this apportionment order is made under the same section which contemplates the possible reconstruction of the premises, it seems to me that, although the order stands while the premises are unchanged and the use unchanged, it is not to be treated as an order in rem which must stand for aye.

In the present case another event happened. On October 11 the landlords took proceedings to obtain registration of the premises as being decontrolled. The proceedings which they took were those provided for by sub-s. 2 of s. 2 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. It will be remembered that, while the Act of 1920 is the principal Act under which control of premises is established, the Act of 1923 provided for decontrol in certain events where the landlord came into possession of the premises. But s. 2, sub-s. 2, of the Act of 1933 provides that if the landlord claims that by virtue of the provisions of s. 2 of

(1) Estates Gazette for Oct. 27, 1934.

(2) [1904] A. C. 31.

the Act of 1923 the principal Act has ceased to apply to the dwelling-house, he shall make an application in the prescribed form for registration of the dwelling-house; and if he obtains registration of the dwelling-house then he can establish, prima facie, by means of that registration that the house has become decontrolled and free from the effect of the principal Act. But he has to make the application for registration in the prescribed form to the council of the county borough within three months after the passing of the Act. If he fails to make that application within the time limited there is an opportunity given to him to recover from the effects of his default; for the proviso enables an application to be made to the county court of the district in which the house is situated. If the county court certifies that there was a reasonable excuse for the failure to make the application for registration of the house within three months, then, if an application for registration is made to the council of the county borough or county district within seven days after the county court has granted the certificate, the decontrol is to apply to the dwelling-house as from the date when the application for registration is made. In other words, by sub-s. 2 of s. 2 of the Act of 1933 a landlord can establish by clear evidence that his premises are decontrolled, but he must take steps to register within three months or within the extended time allowed to him if the county court certifies that there was a reasonable excuse for his failure to register at the proper time.

In the present case, after the apportionment order had been made, the landlords took proceedings to secure registration. They obtained on October 11 a certificate that there was reasonable excuse for their failure to make the application to register within the time limited by the Act, and they afterwards registered the house pursuant to the certificate. The effect of that was that the house became a decontrolled house. Later, by proceedings which were begun in December, 1934, after the house had been registered as a decontrolled house, the landlords took proceedings to recover possession. The learned county court judge came to the conclusion that the house ought to be treated as a decontrolled house and gave judgment for the plaintiffs. It is from that judgment that this appeal is brought.

It is said by Mr. Lawrence that, inasmuch as the apportionment order was made on October 9, 1934, the basis of which was that the house was a controlled house, and inasmuch as that order operated in rem, it is not possible to give effect to the registration, which ought never to have been allowed and could not operate on premises which had been declared by an order in rem to be controlled. There is great weight in that argument, but there is a decision of this Court to which we have to pay loyal attention—namely, *Stokes* v. *Little* (1), which declared that registration out of time after a certificate of excuse has been granted is effective and that the failure to register in time in that case only carries with it the penalty that a period is created during which the application of the principal Act is restored. For by the proviso to sub-s. 2 of s. 2 of the Act of 1933 the restoration of the decontrol, if I may use that phrase, applies to the dwelling-house as from the date on which the application for registration is made. A landlord is not put back into the position in which he would have been if he had applied within the time limit ; he is only given the benefit of decontrol as from the date on which the application for registration is made. Lord Wright in *Stokes* v. *Little* (2) said that delay on the part of the landlord " carries with it the penalty that a period is created during which the application of the principal Acts is restored. That period is the period between the passing of the Act of 1933 and the date of application for registration. If timeous application had been made, the principal Acts would not in such a case, as it seems, have been applicable at all. As it is, they become applicable for what I may call the period of default with whatever detriment may occur in consequence to the landlord during that period." Applying those words to the facts of the present case, it means that while the decontrol obtained by the landlords is

(1) [1935] 1 K. B. 182.

(2) Ibid. 194.

effective from October 11, the penalty which they suffer is that between July 2 and October 11 the premises must be treated as controlled, so that the landlords cannot recover from the tenant more than the standard rent for that period, and must repay the excess if more than the standard rent has been paid.

Slesser L.J. dealt with the alternative view that in such a case the premises continue to be controlled until vacant possession is obtained. Slesser L.J. said (1): " To my mind the proviso does no more, when its conditions are satisfied, than to postpone the date when the landlord may claim that her dwelling-house is excluded from the Act to the date of the application for registration which follows upon the certificate. To give any further effect to this proviso . . . . is to hold that the proviso, when satisfied, has produced an entirely new legal situation, with consequences different from the case where registration is within three months of the passing of the Act, and that the proviso is not merely dealing with the correction of an omission, with consequences as to the time to which rights may be postponed, but is assuming that, after the lapse of the first period for registration, the subsequent registration will produce a more restricted legal right in the landlord by excluding her right to rely upon the fact that she has already once entered into possession, and to require a further new entry. Of course, if the language of the proviso compels it, the Court will not hesitate to come to such a conclusion; but if the language is not so compulsive, so to construe a proviso is contrary to normal canons of construction." He therefore definitely excludes the suggestion that the registration of decontrol is to become operative only from the time when the right to vacant possession accrues to the landlord.

It appears, therefore, putting together the two authorities which we are bound to follow, that while *Aronson* v. *Barker* (2) gave the tenant in the present case the right to recover excess of rent paid by him in the period from July 2 to October 11, from October 11 the premises are to be treated as decontrolled.

(1) [1935] 1 K. B. 197. (2) Estates Gazette for Oct. 27, 1934.

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But Mr. Lawrence relies on the statement by Lord Wright in *Stokes* v. *Little* (1) that the landlord must suffer a penalty by reason of laches in not making application in time for the registration of the premises as decontrolled, and must therefore suffer whatever detriment has occurred as a result of the premises being controlled. And Mr. Lawrence suggests that one of the detriments which has occurred to the landlords in this case is that while they were asleep the tenant has secured an order in rem that the premises are controlled.

Having regard to the explicit words of Lord Wright and of Slesser L.J., I do not find it possible to introduce that meaning into the word "detriment." It is to be observed that in the case of *Stokes* v. *Little* (2) the Court were considering a case in which there was a money claim on one side and a counterclaim for excess rent paid by the tenant against his landlord on the other. No one was considering the question simply of control or decontrol. It was the money claims on both sides which had to be dealt with, and in those circumstances I cannot read into the word "detriment" the penalty inflicted on the landlord that in the intervening period the premises had become controlled by the action of the plaintiff. I think, following *Stokes* v. *Little* (2), that from and after the application for registration the premises were decontrolled. I therefore come to the conclusion that the learned county court judge was right, and that the appeal must be dismissed, with costs.

THE PRESIDENT (SIR BOYD MERRIMAN). I agree that the appeal must be dismissed, but only by reason of my obligation to follow loyally the decision in *Stokes* v. *Little.* (2)

The scheme of the 1933 Act was, while decontrolling certain houses altogether, to create a new class of houses which should not be liable to decontrol by mere resumption of possession on the part of the landlord. That the possible tenant should be under no misapprehension as to the particular category in which a house came the Act set up a register which was to be kept by the local authority, and exacted

(1) [1935] 1 K. B. 194.
(2) Ibid. 182.

as a penalty for failure to register that the house, notwithstanding that it had previously been decontrolled, should be deemed to be controlled.

The decision in *Stokes* v. *Little* (1) is that when an application for registration has been made after obtaining a certificate of reasonable excuse from the county court judge, the house to which the registration relates becomes decontrolled as from the date of the application, although the application to the county court judge for a certificate and the application to register are both done ex parte without the tenant being given an opportunity of testing the position. I am bound to say that I have the very greatest doubt whether that decision is right. But I think it is impossible, having regard to the actual decision in that case, to say that the phrase which my Lord has quoted in Lord Wright's judgment, to the effect that the landlord has to suffer whatever detriment may occur during the period of non-registration, can mean that he has to suffer the detriment that a statutory tenancy has been created, with all the disabilities imposed by the Act of 1933. The actual decision in that case seems to me to be exactly to the contrary effect.

It is said that this case can be distinguished from the decision in *Stokes* v. *Little* (1) by reason of an order made with regard to this house which is binding in rem. The house, having in fact been decontrolled before 1933, became controlled again by the landlords' default on October 18, 1933, or rather by the combined effect of their default and an application by the tenant to apportion the rent. When that apportionment was made there was a decision binding on the parties, and a decision in rem, on the date on which that order was made, that, whatever its consequences might be retrospectively, the house was a controlled house. But I cannot agree that that means that it must necessarily remain a controlled house for all time. Apart from circumstances under the principal Act in which decontrol might be effected, the Act of 1933 itself provides at least one instance of the way decontrol can be brought about, even of this house.

(1) [1935] 1 K. B. 182.

And while I agree that it was impossible for the parties to say, circumstances being as they were on October 9, that the house could be anything but a controlled house, I do not agree that it continued to be impossible for them to say so when the circumstances changed. Here again the decision in *Stokes* v. *Little* (1) becomes applicable, because that case has decided that from the moment of a belated application to register the situation changes, and it seems to me that it would be impossible to say that from that moment there was in the present case any estoppel as between the landlords and the tenant with regard to the condition of the house.

ROCHE L.J. I have very considerable doubt whether the order under appeal should have been made. My doubt arises not so much out of the case of *Stokes* v. *Little* (1), a decision which I think I understand and which we must follow without even considering whether we should have arrived at the same conclusion. My doubt rather arises out of the case of *Aronson* v. *Barker*. (2) In other words, I doubt whether the apportionment order made on October 9 did not amount to a decision that, notwithstanding the Act of 1933 and anything that could be done thereunder, the defendant was a statutory tenant of controlled premises. I agree that if circumstances, of which the President has given an illustration, changed the position, that decision, a decision in rem, would obviously cease to apply. But I doubt very much whether the county court had jurisdiction, after making the order of October 9, to give leave to register under the Act of 1933 on October 11 so as to destroy the effect of its own decision two days before. The case of *Aronson* v. *Barker* (2), which is the case which has given rise to my doubt, is only reported very compendiously, and not reported in any authoritative report, and therefore the scope and grounds of that decision are not entirely clear to my mind. On the whole, therefore, the Master of the Rolls and the President having arrived at the conclusion that the appeal should be dismissed, I think that,

(1) [1935] 1 K. B. 182. (2) Estates Gazette for Oct. 27, 1934.

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having recorded my doubt in the matter, I am not justified in dissenting from their conclusion. The result is that the appeal will be dismissed.

Appeal dismissed.

Solicitors: *Schultess-Young & Co.; Calvert Smith, Bransom & Sutcliffe.*

H. C. G.

LEE *v.* CRAVEN.

1935
April 1.

Sunday Observance — Lending Library — Books lent on Sunday — "Tradesman"—Sunday Observance Act, 1677 (29 *Car.* 2, *c.* 7), *s.* 1.

A person who conducts a lending library is a "tradesman" within the meaning of s. 1 of the Sunday Observance Act, 1677, and commits an offence against the Act if he lends out books on Sunday.

CASE stated by Kingston-upon-Hull justices.

An information was preferred against the appellant, Ralph Lee, charging that he, being a tradesman, had exercised his business, that of a lending library, on Sunday, contrary to the provisions of s. 1 of the Sunday Observance Act, 1677 (29 Car. 2, c. 7).

It was proved or admitted that a shop, No. 8 Chariot Street, Hull, was occupied by a Mr. Franks, who carried on on those premises the business of a lending library, and employed the appellant as his manager. On Sunday, May 13, 1934, two persons had borrowed books for payment from the library and had taken them away.

The Sunday Observance Act, 1677, by s. 1 provides: "No tradesman artificer workman labourer or other person whatsoever shall do or exercise any worldly labour, business or work of their ordinary callings upon the Lord's Day or any part thereof (works of necessity and charity only excepted)."

The justices convicted the appellant and fined him 5*s*., but stated this case.

T. G. Roche for the appellant. The justices were wrong. The Sunday Observance Act, 1677, does not prohibit all persons from working on Sunday, but applies to the four classes enumerated only, for it was held in *Reg.* v. *Silvester* (1) that the words in s. 1 " or other person whatsoever " must be read as ejusdem generis as the other words of the section. The only word which could possibly apply to the appellant is " tradesman." But the appellant is not a tradesman, who is one who buys and sells. Willes J. in *Harris* v. *Amery* (2) said : " It is unnecessary to refer to authorities to show that the word ' business ' has a more extensive meaning than the word ' trade.' It has never been doubted that farming was a business, though it could not properly be called a trade, since the latter has the technical meaning of buying and selling." The appellant carries on a business but not a trade. A barber is not a tradesman : *Palmer* v. *Snow* (3), where Channell J. said (4) : " [Tradesman] means to denote a person carrying on a trade—buying and selling." In *Hawkey* v. *Stirling* (5) it was held that an amusement caterer was a tradesman within the Act of 1677. He conducted a " houp-la " in which persons obtained articles over which they succeeded in throwing rings, for the use of which rings they had paid. But the ground of the decision was that this constituted a sale of these articles.

W. A. Macfarlane for the respondent was not called upon.

LORD HEWART C.J. The facts of this case have been very fairly stated. In my opinion there was evidence upon which the justices could properly come to the conclusion that the appellant was a " tradesman " within the meaning of s. 1 of the Sunday Observance Act, 1677, in the sense in which that word was used by Avory J. in *Hawkey* v. *Stirling* (6),

(1) (1864) 33 L. J. (M. C.) 79.
(2) (1865) 35 L. J. (C. P.) 89, 92.
(3) [1900] 1 Q. B. 725.
(4) [1900] 1 Q. B. 727.
(5) [1918] 1 K. B. 63.
(6) Ibid. 63, 67.

where he said: "In my opinion there was evidence on which the magistrate could come to the conclusion that the appellant was a tradesman within the meaning of this Act, in the sense that he was a person who was trafficking in goods." The appeal must be dismissed.

AVORY J. I agree.

HUMPHREYS J. I also agree.

Appeal dismissed.

Solicitors for appellant: *Steavenson & Couldwell, for Gosschalk & Austin, Hull.*

Solicitors for respondent: *Smith & Hudson, for Payne & Payne, Hull.*

W. L. L. B.

MOORE v. TWEEDALE.

1935
April 2.

Shop—Closing hour—Hairdresser's shop—Customer in shop before closing hour—Hairdressing operation begun before that hour but necessarily continuing after it—Liability of shopkeeper—Shops Act, 1912 (2 & 3 *Geo.* 5, *c.* 3), *s.* 4, *sub-ss.* 1, 2, 7.

The Shops Act, 1912, s. 4, provides: "(1.) Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers not later than one o'clock in the afternoon on one week day in every week. (2.) The local authority may, by order, fix the day on which a shop is to be so closed. . . . . (7.) In the case of any contravention of or failure to comply with any of the provisions of this section, the occupier of the shop shall be guilty of an offence against this Act, and shall be liable to a fine. . . . . Provided that the occupier of a shop shall not be guilty of an offence against this Act when a customer is served at any time at which the shop is required to be closed under this section if he proves . . . . that the customer was in the shop before the time when the shop was required to be closed. . . . ."

On a day on which, by the above section and an Order made thereunder, a shop in the occupation of a hairdresser was required to be closed at 1 P.M., two customers attended at the shop by previous appointment for a hairdressing operation which would necessarily last for four hours more or less for the production of what was known as a "permanent wave." One of these customers arrived at the shop at 10.45 A.M., and in her case the operation began at that hour and continued until 2 P.M. The other customer arrived at the shop at 11 A.M., and in her case the operation began at that hour and continued until almost 4 P.M.:—

Held, that, though the customers were served for the periods of time indicated after the hour at which the shop was required to be closed under the above section, yet, inasmuch as they were in the shop and being served before that hour, the cases came within the proviso to sub-s. 7 of the section, and the occupier was not guilty of an offence against the Act.

Salford Cattle Market Salerooms, Ld. v. *Osborne* (1923) 92 L. J. (K. B.) 1018; 87 J. P. 134; 21 L. G. R. 468, distinguished but observations adopted.

Cope v. *Doherty* (1858) 4 K. & J. 367; 2 De G. & J. 614, and *Parry* v. *Croydon Commercial Gas & Coke Co.* (1863) 15 C. B. (N. S.) 568, 575, principles applied.

CASE stated by justices for the county borough of Bury.

Mr. Frank Tweedale, hereinafter called "the respondent," was a hairdresser carrying on business at 32 Crostons Road in the county borough. Under the provisions of the Shops Act, 1912 (1), and the Bury Hairdressers and Barbers Early Closing Order, 1923 (2), the shop was required to be closed for the serving of customers not later than 1 o'clock P.M. on Tuesday in each week. On Tuesday, March 15, 1934, police constable Richard Moore, hereinafter called "the appellant," saw one Alice Taylor leave the respondent's shop about 2.15 P.M., and she admitted that she had been in the shop for a hairdressing operation known as a "permanent wave" and was then just leaving. On the appellant going to the shop accompanied by Alice Taylor the respondent told him that another woman, Charlotte Goodman, was in the shop and that he was "doing her hair." Alice Taylor had attended at the shop about 10.15 A.M. on the above mentioned date on an appointment made some days previously. Charlotte Goodman, who was also at the shop by previous appointment, had arrived there about 11 A.M. and she left about 4 P.M.

(1) The material provisions of the Act are set out in the headnote.

(2) The Order provided that all shops to which it applied should be closed on Tuesday in each week.

From the arrival of Alice Taylor at the shop until about 2 P.M., when her permanent wave was finished, the respondent and his wife, who assisted him, or one of them were working upon it continuously, and when it was finished they provided her with tea before she left the shop. From the arrival of Charlotte Goodman at the shop the respondent or his wife was working upon her hair until almost 4 P.M., when she left the shop. Some kinds of permanent wave took longer than others, as there was considerable variation in the hair texture of different persons, and consequently the time required for the process varied and took from 3½ to 4½ hours. The respondent employed an assistant who on the day in question left the shop at 1 P.M. and closed the outer doors of the shop so that no other customer could enter, and immediately departed. No other customer entered the shop.

The appellant preferred an information under the above Act and Order against the respondent for that he on and at the said day and place unlawfully did fail to close his shop for the serving of customers not later than 1 P.M.

On June 7, 1934, the information was heard by the justices, when the above mentioned facts were admitted or proved.

On the part of the appellant it was contended that the shop was not closed for the serving of customers in the case of Alice Taylor until 2.15 P.M. and in the case of Charlotte Goodman until about 4 P.M., and that therefore there was a breach of the Order; and that s. 4, sub-s. 7, of the Act (1) did not protect the respondent, as it only applied to the case of a customer who accidentally failed to complete an intended purchase by 1 P.M., and did not protect a shopkeeper who deliberately allowed customers to enter his premises before 1 P.M. with the knowledge that in order to complete the work required by that customer he would have to carry on his business for a long period after the closing hour.

On the part of the respondent it was contended that the respondent had not acted contrary to the Order. The customers, A. Taylor and C. Goodman, were both in the shop, the one about 2½ hours and the other 2 hours, before the time when the shop was required to be closed, and the fact that it took a long time after the closing hour to complete the service did not destroy the protection given by s. 4, sub-s. 7, of the Act. (1)

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(1) The material provisions of the section are set out in the head-note.

The justices were of opinion that the respondent was on May 15, 1934, serving customers within the meaning of the Act, after the hour of 1 P.M., but that inasmuch as the customers were in the shop and were being served some hours before the closing hour, the protective provision of s. 4, sub-s. 7 (1), was operative and the respondent had not committed any offence; and they accordingly dismissed the information.

The question for the Court was whether the justices upon the above statement of facts came to a correct decision in law, and, if not, what should be done in the premises.

J. C. Jolly for the appellant. The justices were wrong in dismissing the information.

The Shops Act, 1912, s. 4, sub-s. 1, and the Bury Hairdressers and Barbers Order, 1923, require that in the county borough of Bury a hairdresser's or barber's shop should be closed for the serving of customers not later than 1 P.M. on Tuesday in each week, and s. 4, sub-s. 7, declares that in case of any contravention of the section the occupier of the shop shall be guilty of an offence against the Act and liable to a fine, provided that he shall not be guilty of an offence when the customer is served at any time at which the shop is required to be closed, if he proves that the customer was in the shop before the time when the shop was required to be closed. On the day in question, which was a Tuesday, the respondent's shop was not closed for the serving of customers by 1 P.M., inasmuch as on that day he was serving the two customers named in the special case after that hour, and he was therefore guilty of an offence against the Act unless he was protected from liability by the proviso to s. 4, sub-s. 7, thereof. That proviso does not protect the respondent from liability. On its true construction that proviso is not of unrestricted operation. It only applies where the transaction of sale or of service is one which the shopkeeper may reasonably suppose will be completed by the closing hour and where the customer is as it were accidentally caught in the shop at that hour before the completion of the transaction. It does not extend to a transaction which the shopkeeper knows or ought to know cannot be completed until after the closing hour. In the present case there is a finding of fact that the time required for the hairdressing process known as a "permanent wave" varies from three and a half to four and a half hours, and the respondent must therefore have known that it could not possibly have been completed in the case of either of these two customers between the hour when the operation began and 1 P.M. Further, at the time when the Act was passed the transactions which took place in hairdressers' and barbers' shops, such as ordinary hairdressing, shaving, and the purchasing of articles for toilet use, were all of comparatively brief duration, and the proviso can have been intended to apply only to these short transactions and not to the lengthy process of later origin known as a "permanent wave," which though begun before the closing time might continue for several hours after that time. In the case of *Salford Cattle Market Salerooms, Ld.* v. *Osborne* (1) which arose under the Shops (Early Closing) Act, 1920, a number of persons were admitted before the closing hour to a shop where retail sales by auction were carried on, but some of the persons remained and bought articles after that hour, and it was there held that the shopkeeper had contravened the Act. There is no distinction in principle between that case and the present.

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(1) The material provisions of the Act are set out in the headnote.

Herbert Malone for the respondent. The justices rightly dismissed the information.

The respondent was not guilty of any contravention of s. 4 of the Act of 1912 or of the local early closing Order. The object of the Act is to deal with shops, and the offence created by s. 4 is that of failing to close a shop at the appointed hour. The respondent did not commit that offence because there is here a finding of fact that on the day in question his shop was closed at the hour fixed by the Act and the Order.

(1) 92 L. J. (K. B.) 1018; 87 J. P. 134; 21 L. G. R. 468.

If the offence prohibited by the section is that of taking part in business transactions in a shop after the closing hour, the only kind of transactions contemplated are those which commonly take place in shops—namely, transactions of sale. This clearly appears from the second part of the proviso to sub-s. 7 of that section, which provides that the occupier shall not be guilty when a customer is served after the closing hour if the article supplied was required in the case of illness. It is true that the term "shop" as defined by s. 19, sub-s. 1, of the Act includes the shop of a barber or hairdresser, in which transactions take place not only of sale but also of service; but that does not imply that the operative provisions of the Act extend beyond transactions of sale. If the offence consists in conducting transactions of sale in a shop after the closing hour, the respondent did not commit it, because the transactions in question were not transactions of sale but of personal service. If the Act does extend to prohibit the continuance after the closing hour of any transactions of personal service in barbers' and hairdressers' shops, it can only be those of a kind which took place in these shops at the time of the passing of the Act, and not to the process of permanent waving, which was not then known. If the Act applies to a transaction of personal service of recent origin, such as permanent waving, then the respondent is protected from liability by the proviso to s. 4, sub-s. 7, of the Act. Here each of the two customers was in the shop before the time when it was required to be closed, for a transaction of personal service which had begun before that time, and she only remained in the shop after that time for the purpose of having that process completed. Under that proviso it is a question of fact and degree for the justices how many customers may remain in the shop and for what length of time they may remain there after the closing hour consistently with the non-liability of the occupier; and here the justices have found that there was no contravention of the Act by the respondent. Where a statutory provision is plain and clear it should be construed according to the natural meaning of its words:

Cope v. *Doherty*. (1) The proviso to s. 4, sub-s. 7, is plain and clear, and, construed according to the natural meaning of its terms, it states that the shopkeeper shall not be guilty if the customer was in the shop before the closing hour. The appellant seeks to introduce into the proviso words implying that the shopkeeper shall not be protected if he begins an operation which he knows cannot be completed until after the closing hour. Where the meaning of a penal enactment is doubtful, the Court ought so to construe it as to give the party liable to the penalty the benefit of the doubt: *Parry* v. *Croydon Commercial Gas Co.* (2) Sect. 4, sub-s. 7, of this Act is a penal enactment, and, if there is any doubt as to its meaning, its stringency should not be increased by restricting the operation of the proviso to the sub-section.

Jolly in reply. The fact that the definition of "shop" in s. 19, sub-s. 1, of the Act includes the shop of a barber or hairdresser, clearly shows that the Act contemplates contracts of personal service as well as contracts of sale, because the business of barbers and hairdressers has always consisted at least as largely of contracts of personal service as of contracts of sale. As the operation of permanent waving did not exist at the date of the passing of the Act, the proviso in question cannot apply to it so as to exempt a shopkeeper from liability who allows it to take place in his shop after the closing hour.

LORD HEWART C.J. In my opinion this appeal should fail. The case has been extremely well argued on both sides, and I think on consideration of the whole matter that the conclusion to be arrived at is reasonably clear.

The Shops Act, 1912, s. 4, provides by sub-s. 1 that a shop shall be closed for the serving of customers by 1 P.M. on one weekday in every week, and by sub-s. 7 that in case of any contravention of that provision the occupier of the shop shall be liable to a fine, provided that he shall not be liable "when a customer is served at any time at which the shop is required to be closed under this section if he proves . . . . that the customer was in the shop before the time when the shop was required to be closed." The words of that proviso must mean that the customer was actually in the shop before the time when it was required to be closed and remained there up to and after the closing hour, and not merely that he was in the shop before the closing hour and returned to be served in it afterwards. It is said on behalf of the appellant that the proviso does not protect the shopkeeper if he begins to perform an operation which he knows cannot be completed before the closing hour. It is beyond dispute, however, that in construing a statutory provision the Court is bound by the words used, if they are reasonably plain: *Cope* v. *Doherty* (1), and that it ought not to read into a penal section, such as this is, any words which will extend the operation of the section: *Parry* v. *Croydon Commercial Gas Co.* (2) Where as a physical fact the customer is in the shop before the time at which it is required to be closed and the shop is closed at the proper time and is not opened afterwards for the purpose of serving customers, the shopkeeper would appear to be protected by the proviso relied upon.

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(1) 4 K. & J. 367; 2 De G. & J. 614.

(2) 15 C. B. (N. S.) 568, 575.

Much has been said about the case of *Salford Cattle Market Salerooms, Ld.* v. *Osborne.* (3) I have a clear recollection of that case, which was decided in 1923 under the Shops (Early Closing) Act, 1920, the Schedule to which, Part I., paras. 1 and 2, contains provisions somewhat similar to those of the section now in question. Twelve more years have since gone by, and I observe that every member of the Court by which that case was decided took pains to guard himself against construing the words of that enactment as applying to all the infinitely varying circumstances which might arise in particular shops. I said: "I am not attempting to imagine, much less to lay down, an exhaustive description of what is permitted by para. 2," and Shearman J. said: "I do not want to lay down any general principles on certain things, which, if the matter should come up, will be more specifically determined. It is clear that the shop is to be closed for the serving of customers. The scheme is that customers shall only be served within the permitted hours. The exception is the serving of a customer when it is proved that the customer was in the shop before the closing hour." (1) I accentuate the stress we all laid upon the word "customer." My own observations, if I may be permitted to refer to them, were these: "In other words, you have a contrast suggested between a general keeping open of a shop in order to invite persons to become customers, and, on the other hand, a serving in an emergency of a particular existing customer who happens to be caught in the shop, so to say, by the coming of the closing hour." (2) There is a wide difference between keeping a shop open after the closing hour for the purpose of inviting persons to become customers after that hour, and, on the other hand, continuing in a shop which has been closed at the closing hour to serve a customer who became a customer before that hour.

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(1) 4 K. & J. 367, 374; 2 De G. & J. 614.

(2) 15 C. B. (N. S.) 568, 575.

(3) 92 L. J. (K. B.) 1018.

On the facts of this case I think that the justices were entitled to hold that no offence was committed by the respondent. These two visitors to the shop were genuine customers before the closing hour, and not stray persons from the street who had entered before that hour in order that they might become customers afterwards. They had gone there by previous appointment some considerable time before the closing hour for a hairdressing process which began as soon as they arrived there. One of them had arrived at 10.15 A.M. and the other at 11 A.M. It further appears that the assistant whom the respondent employed had to leave at the closing hour, and that the respondent and his wife were not able to do all the work that was necessary to complete the services which were being rendered to these customers before the shop was closed. In the circumstances I cannot read into the proviso to s. 4, sub-s. 7, any words which made it obligatory upon the justices to say that the provisions of the section had been infringed.

A case may possibly arise hereafter in which it appears that the shopkeeper has entered into a contract for the carrying out of a process which must keep the shop open until after the closing hour, but that is not this case. There appears to me to be great force in the contention that in 1912, when this Act was passed, the Legislature cannot be supposed to have foreseen that there would be so long continued a hairdressing process as a "permanent wave."

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(1) 92 L. J. (K. B.) 1020.

(2) Ibid. 1018, 1020.

I think that the decision of the justices was right, and that this appeal should be dismissed.

AVORY J. I am of the same opinion. In view of the plain words of the proviso to sub-s. 7 of s. 4 of the Act it is impossible, I think, to come to any other conclusion. On the facts there is no doubt that each of these two women was, within the meaning of the proviso, a "customer . . . . in the shop before the time when the shop was required to be closed." There is a clear distinction between this case and the case of *Salford Cattle Market Salerooms, Ld.* v. *Osborne* (1), in which the whole weight of the judgments was based upon the fact that the persons to whom articles were sold were not customers in the shop before the closing hour, but were invited to become customers after that hour. I entirely agree with my Lord in thinking that a case of this kind probably comes within the mischief which the Act was designed to prevent, but by the proviso in question the shopkeeper is protected if he proves that the customer was in the shop before the hour when it is required to be closed. In order to meet a case like the present some amendment of the provisions of the Act would be necessary, but under these provisions as they stand there is no ground for saying that the decision of the justices was wrong.

HUMPHREYS J. I am of the same opinion. This is a case in which the justices have dismissed the information, and we cannot impeach their decision unless we are satisfied that they have misdirected themselves in law. They found as facts that the respondent was on May 15, 1934, serving customers within the meaning of the Act after the hour of

(1) 92 L. J. (K. B.) 1018.

1 P.M. prescribed by the local early closing Order, but that the customers were in the shop and were being served some hours before the time the shop was required to be closed; and they then gave it as their view of the law that the respondent had not been guilty of any breach of the order and therefore had not committed any offence against the Act. From the second of these findings of fact, namely, that the customers had been in the shop before the closing hour, it necessarily followed that there should be an acquittal from the charge, and it is therefore impossible to say that in the circumstances the justices were wrong in coming to the conclusion that there was no ground for convicting the respondent. I agree that this case has disclosed the possibility of an undesirable continuation of business in shops after the statutory closing hour amounting to a breach of the intention of the Act although not punishable as such. To remedy that state of matters is, however, beyond the power of the Court.

Appeal dismissed.

Solicitors for appellant: *Lewin, Gregory, Torr, Durnford & Co., for Richard Moore, Town Clerk, Bury.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for F. A. Bradley, Bury.*

J. R.

1935
May 8, 9,
10, 14.

TATTERSALL *v.* DRYSDALE.

[1934. T. 134.]

Insurance (Motor-Car)—Third-party risks—Action against Motorist—Driving with consent of Assured—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 36, *sub-s.* 4—*Life Assurance Act,* 1774 (14 *Geo.* 3, *c.* 48), *s.* 2.

A motor insurance policy declared that "this insurance shall extend to indemnify any person who is driving on the assured's order or with his permission" in respect of various liabilities, which included third-party risks.

Sect. 36, sub-s. 4, of the Road Traffic Act, 1930, which deals with Third-Party Risks, provides: "Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons":—

Held, that, upon the true construction of the section, the insurers were freed from the requirements of the Life Assurance Act, 1774, as to insurable interest and the presence in the policy of the name of the assured, and that the insurers were legally bound to indemnify all "persons or classes of persons" referred to in the policy, whether parties to the contract of insurance or not.

Where in a motor insurance policy a particular car is specified as the subject of insurance, and by a clause in the policy its benefits are extended to the assured when driving another car with the owner's permission, the interest of the assured ceases when he parts with the specified car, and the extending clause falls together with the rest of the policy.

Rogerson v. *Scottish Automobile & General Insurance Co.* (1930) 47 Times L. R. 46 and (H.L.) (1931) 48 Times L. R. 17 followed on this point.

ACTION before Goddard J. without a jury.

The plaintiff, Dr. George Tattersall, claimed a declaration that the defendant, Matthew Drysdale, a Lloyd's underwriter, was liable to indemnify the plaintiff to the extent of the defendant's proportion of liability under a Lloyd's Eclipse motor policy issued by the defendant and other underwriters to one Walter Gilling. The Eclipse policy contained a clause extending the benefits of the policy to a person driving with the permission of the assured, "provided that such person is not entitled to indemnity under any other policy." On

September 9, 1934, the plaintiff was driving the Riley saloon car which was the subject of this insurance, with Gilling's permission (as the learned judge found), when an accident occurred and judgment was afterwards obtained against him for 2150*l.* by way of damages for negligent driving. The plaintiff claimed to be indemnified under the Road Traffic Act, 1930, s. 36, sub-s. 4, in respect of this liability, upon the terms of the Eclipse policy.

The plaintiff also held a motor insurance policy issued by the London & Edinburgh Insurance Company in respect of a sixteen horse-power Standard car belonging to him which contained an indemnity against third-party risks.

The plaintiff's own policy contained a clause extending the indemnity against third-party risks to the assured "whilst personally driving for private purposes any other private motor car . . . . not belonging to the assured in respect of which no indemnity is afforded the insured by any other insurance applying to such car," provided that the car thereby insured should not be in use at the same time.

The points raised by the defence were (1.) that the Road Traffic Act, 1930, s. 36, sub-s. 4, gave the plaintiff no cause of action; (2.) that the plaintiff was not driving with permission; and (3.) that the plaintiff's own policy was in force at the time of the accident and therefore the plaintiff was not entitled to recover upon the Eclipse policy. The facts of the case are fully set out in the judgment.

H. D. Samuels K.C. and *F. Soskice* for the plaintiff.

R. P. Croom-Johnson K.C. and *R. T. Monier-Williams* for the defendant.

The arguments of counsel appear sufficiently from the judgment of Goddard J.

Cur. adv. vult.

May 14. GODDARD J. read the following judgment: This case raises a question of general interest and considerable importance in the law of motor-car insurance. It has to be determined, I think for the first time, what effect, if any,

s. 36, sub-s. 4, of the Road Traffic Act, 1930, has upon a clause which, in one form or another, has for many years appeared in motor-car policies whereby the underwriters declare that the insurance affords indemnity to persons not themselves parties to the policy, or otherwise insured, who may be driving the insured car with the permission of the assured. The answer affects not only civil rights but criminal liabilities, for if a person uninsured in his own name is driving a friend's car, he is committing an offence which may involve him in serious penalties unless he is covered by the policy granted to the owner of the car.

The facts as I find them are as follows: Dr. Tattersall, the plaintiff, on November 10, 1931, insured himself against third-party risks in respect of a Morris Oxford car under a policy subscribed by the London & Edinburgh Insurance Company, Ld. He changed his car from time to time, the changes being duly endorsed on the policy, and by an endorsement dated November 8, 1932, the insurance was enlarged so as to give full cover and not merely against liability to third parties. The last car which he owned before the events giving rise to this action, was a sixteen horse-power Standard, covered by an endorsement dated April 11, 1934. Being minded to get yet another car, in August, 1934, he made an agreement with Gray Bros. & Kemp, Ld., motor-car dealers of Hull, of which company a Mr. Gilling was a director. He did not desire immediate delivery of a new car, and, indeed, he had not finally decided what car he would have. Messrs. Gray were to allow him 180*l.* in respect of his Standard, which he was to transfer to them towards the price of the new car, and they wanted the Standard car at once, as they would have a better chance of selling it during the summer months. The bargain was reduced into writing by a letter of August 13, which is in these terms: " Dear Sir, We beg to thank you for your valued order given to the undersigned to-day, and beg to confirm that we shall make you an allowance of 180*l.* on your Standard Swallow Saloon against any new car you care to select to the approximate value of 200*l.* and in the event of you spending more than this amount, we will make you an additional allowance of 7½ per cent. on the amount in excess of the amount stated. We are arranging to send the Standard Swallow down to London to-morrow (Wednesday) morning and to bring back the Riley Saloon, which we have pleasure in lending to you, free of charge, until such time as you get delivery of your new car."

The plaintiff handed over his car to the company on that day, and they disposed of it to a Mrs. Hay on August 15, 1934. The Riley Saloon which the company arranged to lend to him was in fact the property of their director, Mr. Gilling, and was insured by him under a Lloyd's Eclipse Policy of which the defendant is one of the underwriters. Down to the time when the bargain was made there had been no mention of the insurance of the Riley car. This was delivered to the plaintiff on August 17 or 18, 1934, it matters not which. When the plaintiff took possession of it he looked at his policy, or his certificate, and came to the conclusion, as did Mr. Stephenson, the company's salesman, that for the purpose of the Road Traffic Act he was insured while driving this car under his own policy. Mr. Gilling thought that it was his policy that would have to bear any loss if there was an accident, and accordingly was anxious that the plaintiff should arrange for the Riley to be insured in his own name. The plaintiff was quite willing, and communicated with the agent of the London & Edinburgh Company. Unfortunately, before enough information had been given to enable the Riley car to be substituted for the Standard on the policy, the plaintiff was involved in a serious accident and had to pay 2150*l.* damages. This action is brought in effect to determine on which body of insurers that loss is to fall, and I am told, and it is right I should say so, that it has been arranged that the loss will in no case fall on the doctor. Both policies provide that the insurance is extended to indemnify a person driving the insured car with the assured's permission provided that such person is not entitled to indemnity under any other policy. The wording of the two extension clauses is not identical, but in substance there is no difference between them, though it will be necessary to examine the extension clause in the plaintiff's policy to determine whether that policy was in force at the time of the accident.

The plaintiff says that he is given a cause of action for indemnity against Mr. Gilling's underwriters by virtue of the section to which I have referred. He further says his policy had ceased to be in force at the time of the accident. He also alleges that if the section gives him a right of action against the defendant he is entitled to contribution to the extent of one-half, even if his own policy was in force at the time of the accident under the doctrine laid down in *Weddell* v. *Road Transport and General Insurance Co.* (1) Though I had some doubt whether this alternative was properly raised in the pleadings, I allowed Mr. Samuels to argue it, though in the view I have formed it is unnecessary to express any opinion thereon.

The defendant's contentions are that the section gives the plaintiff no cause of action against him ; that in any case the plaintiff was not driving the car with Gilling's permission, and that his own policy was still in force at the time of the accident. He says that whatever be the true effect of the section, if these two latter contentions be correct the plaintiff cannot bring himself within it. I therefore consider them first.

As to the question of permission, I am clearly of opinion that he was driving with Gilling's permission. It was said that Mr. Gilling never intended that the plaintiff should drive the car until he had himself insured it and that the plaintiff understood this. The truth is that no bargain about insurance was ever made. Gilling, on handing over his car after the bargain had been made, wished the plaintiff to insure it and he was willing to do so, but he was allowed to drive it as he wished, and Gray & Co., in whose hands Gilling had left the matter and at whose garage the plaintiff kept the car, knew he had not got it on to his policy. I have no hesitation in holding that there is nothing in that point.

I now turn to the question whether the plaintiff's policy was in force at the time of the accident. It is argued that it was not, because he had sold the car referred to in the policy and the company had not yet accepted the Riley which he was then using. The answer to the question mainly depends on whether this case is governed by *Rogerson* v. *Scottish Automobile & General Insurance Co.*, which was affirmed in the House of Lords. (1) The words of the extension clause in this policy are different from those used in *Rogerson's* case (1), and Mr. Croom-Johnson argues that the latter case really turned only on the construction placed on the phrase " instead of the insured car," which do not appear in the clause under consideration. But in my judgment that view is too narrow. I think that both in the Court of Appeal and the House of Lords the decisive factor was that the subject-matter of the insurance was the specified car, and that as the assured had parted with it he no longer was interested in the policy. The true view, in my judgment, is that the policy insures the assured in respect of the ownership and user of a particular car, the premium being calculated, as was found in *Rogerson's* case (1), partly on value and partly on horse-power. It gives the assured by the extension clause a privilege or further protection while using another car temporarily, but it is the scheduled car which is always the subject of the insurance. Though the words differ in the two policies, the effect and intention seem to me to be the same, and express provision is made for what is to happen when the assured parts with the car. To construe this policy otherwise would be to hold in effect that two distinct insurances were granted, one in respect of the scheduled car, and another wholly irrespective of the ownership of any car. It may be that a person who does not own a car can get a policy which would insure him against third-party risks whenever he happens to be driving a car belonging to some one else; but the clause I am considering is expressly stated to be an extension clause, that is extending the benefits of this policy, and accordingly if the assured ceases to be interested in the subject-matter of the insurance the extension falls with the rest of the policy.

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(1) [1932] 2 K. B. 563.

The position, therefore, in my judgment being that the plaintiff was driving the Riley with the permission of Mr. Gilling at the time of the accident, and that he was not entitled to indemnity under any other policy, I have now to consider whether he can claim indemnity against the defendant by virtue of the Road Traffic Act, 1930, s. 36, sub-s. 4. Considering that no less an authority than Scrutton L.J. has said that he had read this section several times without understanding it (see *Jones* v. *Birch Brothers, Ld.*) (1), I naturally approach its construction with considerable diffidence. But with regard to the opening words of the section: "Notwithstanding anything in any enactment," I have the advantage of the decision of the Court of Appeal in *McCormick* v. *National Motor & Accident Insurance Union.* (2) As I understand that case, these words exclude any consequences that might otherwise result from the operation of the Life Assurance Act, 1774 (14 Geo. 3, c. 48). In *Williams* v. *Baltic Insurance Association of London, Ld.* (3), it had been held in a Court of first instance that this Act did not apply to a policy of motor insurance, and it seems therefore that this provision is inserted to preserve the decision to that extent, and to guard against the possibility of a higher Court taking a different view.

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(1) 47 Times L. R. 46 and (H.L.) 48 Times L. R. 17.

The Eclipse policy which I am considering provides that "the insurance shall extend to indemnify any person who is driving on the assured's order or with his permission in respect of any legal liability as aforesaid"—that is to third parties. It has been decided by the Judicial Committee in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (4) that this clause confers no rights on such a person either at common law or in equity unless there was an intention on the part of the assured to create a trust for such person, or unless the assured was acting with the privity and consent of such person so as to be contracting on his behalf.

The question is therefore whether the statute has conferred a right of action on such a person and thereby altered the law. Does the section merely mean that, in spite of the provisions of the Life Assurance Act, the insurers shall indemnify the assured against any liability which the policy purports to cover, or does it mean that, freed from any difficulties caused by the Life Assurance Act as to insurable interest and as to the absence of any name in the policy other than that of the assured, the insurers shall indemnify every one whom they have said they will indemnify, in respect of the liability they have indicated ?

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(1) [1933] 2 K. B. 597, 608.

(2) (1934) 49 Ll. L. Rep. 361; 40 Com. Cas. 76.

(3) [1924] 2 K. B. 282.

(4) [1933] A. C. 70.

In my judgment both the policy of the Act and the words used point to the latter conclusion being the right one. The Act was aimed at the protection of the public by providing that there should be a body of insurers behind every driver of a car. As I said earlier in this judgment, this clause has been common, and I think universal, in all private motor-car policies for many years. Parliament may be supposed to have known that this was so, and it seems to me no unreasonable supposition that they should enact that if insurers say that they undertake the insurance of persons driving with the assured's permission, statutory effect should be given to their undertaking. The fact that the section mentions "classes of persons" seems to me to support this view. It is, I should think, difficult to envisage a motor-car policy in which a class of persons contract with the underwriters; the latter contract with A., or with A., B. and C., or with A., B., Ld. But if they say they will also cover the friends or servants of the assured in respect of certain liabilities, it seems to me that they are specifying a class of persons and that the policy purports to cover the liabilities of that class. This view, is I think, supported by the judgment of Greer L.J. in *McCormick's* case. (1) That case was concerned with an attempt by the injured person to sue the underwriters and so is not a direct authority on the present case. But Greer L.J. says: "I think it is quite clear that the section was intended to meet the difficulty that was patent; first, that nobody who was not a party to a contract could bring an action on the contract; and, secondly, by reason of the statutory and well known law that a person who has no interest in the subject-matter of an insurance cannot claim the benefit of that

(1) 40 Com. Cas. 90.

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Goddard J.

insurance.'' I read that passage as meaning that in his opinion the section was not only intended to effect but has effected a change in the law and given a cause of action which hitherto did not exist to a person indicated in the policy but not a party to it, and I respectfully agree with that view.

If the words of the section will bear this construction then, although another reading of the words may be possible, there seems to be an excellent and indeed compelling reason for preferring it to any other. It must be that insurance companies and underwriters believe that the statute has placed them under a legal liability to indemnify persons who are driving with the assured's consent if they have so undertaken in the policy; for, otherwise, the undertaking is binding only in honour. No doubt many insurances are written which are only honour policies; p.p.i. policies at once occur as instances, and reinsurance treaties are constantly made which are invalid in law for want of a policy, though respectable underwriters never question them. But since the Road Traffic Act insurers have to provide their assured with certificates of insurance in a form prescribed by the Minister of Transport. The prescribed form requires the certificate to indicate the persons or classes of persons entitled to drive the insured car. The certificates shown to me in this case, and indeed all certificates that I have ever seen since the Act came into force relating to a private car, state that among the persons or classes of persons entitled to drive is a person driving the car with the policy holder's permission. These certificates are for the purpose among other things of affording proof to the police, and it may be to magistrates, that the driver is insured. If the insurers are bound in honour only, these certificates are in this respect entirely illusory, and it is not to be supposed that English insurance companies and underwriters would issue formal documents required by statute containing a statement that they had insured persons unless they believed that they had issued a valid insurance. Of course if the section will not bear this interpretation, the belief or intention of the insurers will not make it do so, but if it will it seems to me right to prefer the construction acted upon by the large body of business men affected by it to any other.

Accordingly I give judgment for the plaintiff, declaring that the defendant is liable to indemnify the plaintiff in respect of a judgment obtained against him by Frances Smith for 2150*l.* and costs and for the costs he has incurred in dealing with and defending that claim to the extent of his proportion of his liability under an Eclipse policy of motor-insurance subscribed by him in favour of Walter Gilling and dated April 1, 1932.

Judgment for plaintiff.

Solicitors for the plaintiff: *L. Bingham & Co.*
Solicitors for the defendant: *Clifford-Turner & Co.*

F. P. F.

In re SIR J. W. B. SIMEON, BT.

1935
Jan. 24.

Local government—Public works facilities—Compulsory purchase order—Insertion in order of name of person not owner of land—Order whether ultra vires—Notice in similar form of making of order—Validity—Confirmation of order by Minister of Health—Application to set aside order—Minister whether bound to hear applicant before confirming order—Public Works Facilities Act, 1930 (20 & 21 *Geo.* 5, *c.* 50), *First Schedule, Part II., para.* 3 (*b*), *para.* 4; *Part III., para.* 2 *—Public Works Facilities* (*Procedure, Ministry of Health*) *Order,* 1930 (*St. R. & O.,* 1930, *No.* 1057), *First Schedule, Forms I., III.*

By a conveyance made in 1932 the applicant sold land to a purchaser in fee simple subject to reservations in favour of himself and his grantees of certain rights to surface and underground water. Subsequently the local district council as water authority acting ostensibly under the Public Works Facilities Act, 1930, s. 2, made an order purporting to be a compulsory purchase order in the prescribed form authorizing them to purchase a part of the land comprised in the conveyance, there being inserted in the schedule to the order under the heading "Owners or Reputed Owners" not only the name of the purchaser under the conveyance but also the name of the applicant, and under the heading "Quantity, Description and Situation of the lands" a full description of the land but no mention of the applicant's easement over it; and the council served upon the applicant a notice of the making of the order purporting to be a notice in accordance with the Act and in the prescribed form, the schedule to which notice contained a full description of the lands but made no mention of the easement. The applicant gave notice of objections to the confirmation of the order by the Minister of Health, and by direction of the Minister a public local inquiry was held in regard to the matter before an officer of the Ministry, who stated that the objections raised points of law which could not be dealt with by him but must be considered by the Minister. Having considered the objections and read the report of the officer, the Minister confirmed the order. The applicant thereupon made an application to the High Court under the First Schedule, Part III., para. 2, of the Act that the order might be set aside on the grounds: (1.) that the order was not within the powers of the Act, inasmuch as, though the Act authorized only the purchase of land, the order included the name of the applicant who had merely an easement over the land and therefore purported to acquire what was not land; (2.) that the property to be acquired was not sufficiently described in the order or the notice thereof, as no mention was made in them of the applicant's easement; and, further, that the notice of the order did not, pursuant to the First Schedule, Part II., para. 3 (*b*), of the Act state the " effect of the order," because it did not bring home to the applicant what effect the order would have upon him or his property; and (3.) that the Minister did not before deciding whether or not the order should be confirmed give the applicant an opportunity of coming before him and stating his legal arguments in support of the objections:—

Held, that the application could not be supported on any of these grounds, and must therefore be refused.

Application to set aside a compulsory purchase order confirmed by the Minister of Health.

At and before the date of the next mentioned conveyance, Sir John W. B. Simeon, Bt., hereinafter called " the applicant," was the owner of the whole of an estate known as the Swanston Estate in the parish of Calbourne in the Isle of Wight.

By a conveyance made in 1932 the applicant conveyed land forming part of that estate and known as Pitts Farm, Calbourne, in fee simple to Mr. Percy R. Strickland subject to a reservation to the applicant of water whether surface or underground in or under the land, and to the Isle of Wight District Council as local water authority of rights granted to them by previous agreements to take underground water in consideration of certain payments or royalties, except water required by the purchaser for agricultural or domestic purposes, and subject to a covenant by the purchaser not to do anything whereby any supply of water from the land should be diminished or the purity thereof impaired.

Between 1928 and the early part of 1934 negotiations took place between the Isle of Wight Rural District Council, hereinafter called "the council," and the applicant with a view to the acquisition by the council of the sole right to obtain water from the said estate, but no agreement was concluded between the parties.

On April 17, 1934, the council, in the exercise of their powers under the Public Works Facilities Act, 1930, s. 2, sub-s. 1, made a compulsory purchase order in the prescribed form, authorizing the council to purchase compulsorily, for the purpose of obtaining water in connection therewith, the land described in the schedule thereto being certain land forming part of Pitts Farm. The schedule included under the heading "Quantity, description and situation of lands" the following account of the land to which the order related: "Approximately 15½ acres of pasture land . . . . part of Pitts Farm, Calbourne, in the parish of Calbourne, Isle of Wight, being part of field No. 959 on ordnance survey map," but made no mention of the easements of water, and included under the heading "Owners or reputed owners" the names of the purchaser of Pitts Farm and of the applicant.

Thereupon a notice in the prescribed form (1) was served upon the applicant of the making of that compulsory purchase

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(1) Public Works Facilities Act, 1930, s. 2: "(1.) Any local authority or statutory undertakers may be authorised to purchase land compulsorily for any of the purposes specified in Part I. of the First Schedule to this Act by means of an order (in this Act referred to as a 'compulsory purchase order') made and submitted to the appropriate Minister and confirmed by him in accordance with the provisions of Part II. of that Schedule, and the provisions of Part III. of that Schedule shall have effect with respect to the validity and date of operation of any such order: . . . ."

First Schedule.

. . . .

Part II.

1. A compulsory purchase order shall be in the prescribed form and shall describe by reference to a map the land to which it applies . . . .

3. Before submitting the order to the Minister the local authority or statutory undertakers shall— . . . .

(*b*) serve in the prescribed manner on every owner, lessee and occupier (except tenants for a month or less period than a order, the schedule to that notice containing the same description of the lands as that above set out, and making no mention of the easements.

On May 11, 1934, notice of objection to the confirmation

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month) of any land included in the area to which the order relates a notice in the prescribed form stating the effect of the order and that it is about to be submitted to the Minister for confirmation, and specifying the time within and the manner in which objections thereto can be made.

4. If no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification, but in any other case he shall, before confirming the order, cause a public local inquiry to be held, and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order either with or without modification: . . . ."

Public Works Facilities (Procedure, Ministry of Health) Order, 1930 (St. R. & O., 1930, No. 1057).

First Schedule.

Form I.

"*Form of Compulsory Purchase Order made by Local Authority under s. 2 of the Public Works Facilities Act,* 1930.

[The Description of local authority] hereby make the following order:—

1. Subject to the provisions of this Order the above-named Council are hereby authorised to purchase compulsorily for the purpose of [Purpose for which land is to be acquired] the lands which are described in the Schedule hereto, and are coloured red on a map marked . . . . and deposited at the offices of the Council.

. . . .

The Schedule.

[This contains a column headed 'Quantity, description and situation of the lands,' and a column headed 'Owners or reputed owners.']

Given under the seal. . . . ."

Form III.

"*Form of notice to Owners, Lessees and Occupiers of the making of a Compulsory Purchase Order.*

Take notice that the [Description of local authority] in pursuance of the powers vested in them by s. 2 of the Public Works Facilities Act, 1930, on the day of , 193 , made a compulsory service order which is about to be submitted to the Minister of Health for confirmation authorising them to purchase compulsorily for the purpose of [Purpose for which land is to be acquired] the lands described in the Schedule hereto.

. . . .

Any objection to the Order must be made in writing and addressed to the Minister of Health, Whitehall, London, S.W., before the [date 14 clear days from service of notice] day of .

Schedule.

[Here is to be inserted the description of the lands comprised in the Order.]

Dated this .

Signature of Clerk of
Local Authority."

of the compulsory purchase order was given on behalf of the applicant on the grounds: (i.) that s. 2 of the Act of 1930 authorized only the purchase of land, (ii.) that the order did not specify what was to be purchased of the applicant, the land referred to in the schedule to the order being vested in the purchaser thereof subject to certain reservations in favour of the applicant.

On May 28, 1934, notice was given by the Minister that a public inquiry would be held in pursuance of the Act of 1930.

On June 14, 1934, the public inquiry was held before an officer of the Ministry of Health. It appeared from the evidence on behalf of the council that the compulsory purchase order was made upon the footing that the reservation in the said conveyance was of no effect. The officer stated that the objections and the inquiry raised questions of law with which he could not very well deal and which would have to be considered by the Minister.

On August 11, 1934, the Minister, after considering the report of the officer, confirmed the compulsory purchase order.

On September 11, 1934, notice to treat was served by the council upon the applicant.

The applicant gave notice of an application to the High Court dated September 18, 1934, under the First Schedule, Part II., para. 2, of the Act, for an order that the compulsory purchase order be set aside on the grounds: (1.) that that order was not within the powers of the Act of 1930; and (2.) that the requirements of the Act had not been complied with in that (i.) the property proposed to be acquired was not sufficiently described in that order, and (ii.) the objection of the applicant to that order had not been sufficiently considered by the Minister.

Sir Gerald Hurst K.C. and *L. W. Byrne* for the applicant.

Sir Donald Somervell S.-G. and *R. C. Essenhigh* (*W. Bowstead* with them) for the Minister of Health, respondent.

BRANSON J. This is an application by Sir John Walter Barrington Simeon, Bt., under the Public Works Facilities

Act, 1930, First Schedule, Part III., para. 2. Though in form an application, it is in substance an appeal against a compulsory purchase order made under s. 2 of the Act by the Isle of Wight Rural District Council on April 17, 1934, under the First Schedule, Part II., para. 4, the applicant moving that that order should be set aside upon the grounds: (1.) that the order is not within the powers of the Act, and (2.) that the requirements of the Act have not been complied with in two respects: (i.) because the property proposed to be acquired is not sufficiently described in the order, and (ii.) that the objection of the applicant to the order has not been sufficiently considered by the Minister.

The situation out of which this dispute arises is that the applicant, having been the owner of certain land at Calbourne, in the Isle of Wight, conveyed it in fee simple some years ago to Mr. Percy Strickland, but reserved certain water rights, namely rights to deal with surface water and water percolating through to the subsoil, and rights to allow the local authority for a royalty or payment of so much a gallon to take that percolating water. The compulsory purchase order applies not to the whole, but to a portion, to wit 15½ acres of the land which had been sold by the applicant to Mr. Strickland, and the order contained in a column headed "Owners or reputed owners" the names of both Mr. Strickland and the applicant, and both the order and the notice of the making of the order contained a full description of the land comprised in the order.

The first of the grounds of appeal arises in the following way: It is said that the Act authorizes the acquisition of land but does not authorize the acquisition of any property or proprietary right in or over land, which is not land, and that this order has authorized the purchase of something from the applicant which is not land and is therefore ultra vires. It is argued that the order, by putting the applicant's name under the heading "Owners or reputed owners" when he has no interest in the land described, purports to acquire from him something which is not land, and, as the Act only authorizes the acquisition of land, that the order is therefore ultra vires. That argument depends wholly upon the assumption that the insertion of the applicant's name in that column means that the order is authorizing the acquisition of something from him. I do not think that that assumption is justified. It seems to me that what the order means is that, if the applicant has any interest in the land described, that interest may be bought; but if what he has is some kind of right which is not an interest in land and not land within the meaning of that word as used in this Act, then the fact that his name appears in that column effects no more as against him than the appearance in that column of the name of a person who did not happen to be the owner of the land would effect as against that person. The presence of the expression "reputed owners" in the heading of the column is enough to show that the insertion of the name in the column does not of necessity indicate that anything is being purchased from the person whose name appears there. For these reasons I think that the first point taken on behalf of the applicant fails, and that the order is not ultra vires the statute.

The second ground of appeal, as stated in the notice of motion, is that the property proposed to be acquired is not sufficiently described in the order. This point is open to much the same objection as the first point. It is only by assuming that the order is intended to be an order purporting to acquire such rights as the applicant reserved for himself and his grantees under the deeds which have been referred to that the point can be made at all. The property is described in the second column of the schedule to the order as approximately 15½ acres of pasture land bearing a number on the ordnance survey map which is given, and the description of the land thus defines it perfectly and is unobjectionable. Unless one is to suppose that the order is intended to refer to something other than what it describes, no complaint can be made of the description given. The point has, however, been presented somewhat differently on different occasions. Sir Gerald Hurst put it in another way in the course of his argument before me. He said that the notice of the making of the order was bad, because it did not state the "effect of the order" as required by the First Schedule, Part II., para. 3 (*b*), of the Act. He submitted that that expression means that the notice shall bring home to the person receiving it what effect is going to be produced upon him or his property by the order if it is carried through, and that this notice did not do so. I do not so read the expression as there used. I think it means that the notice is to give an indication of what the order contains. Para. 3 (*b*) further provides that the notice of the making of the order is to be in the prescribed form. [His Lordship read the prescribed form of notice and continued :] That form of notice has been adopted in the present case. This notice complies with it in all respects, setting forth the purpose for which the land is to be acquired, and containing in its schedule the same full description of the land as was contained in the schedule to the order, thus making it clear beyond peradventure what the land referred to was. I think, therefore, that in this respect the Act has been fully complied with, and that the second objection which has been raised also fails.

That leaves only the third ground for this application, which is that the objections of the applicant to the order have not been sufficiently considered by the Minister of Health. This point is put in the following way It is said that the applicant having raised certain objections before the gentleman who was holding the public inquiry, to wit (I.) that, while the Act only authorizes the purchase of land, the order was authorizing the purchase of something which was not land, and (2.) that the order did not sufficiently specify what was to be bought from the applicant, and the holder of the inquiry having said that these were legal matters which he could not very well deal with himself and which must be considered by the Minister, it thereupon became incumbent on the Minister under the Act to appoint a day and to give an opportunity for representatives of the applicant to come and put before him the legal arguments in support of these two objections. It is said, on the other hand, that no such obligation was imposed upon the Minister. The obligation, if any, must arise under the First Schedule, Part II., para. 4, of the Act,

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SIR J. W. B. SIMEON, BT., *In re.*

Branson J.

which is as follows: [His Lordship read the paragraph and continued:] It seems to me that the submission of the Solicitor-General as to the meaning of that paragraph is right The paragraph provides for the Minister causing a public inquiry to be held at which the parties can appear and be heard. It does not provide for any second hearing before the Minister, who has only to consider any objection not withdrawn and the report of the person who held the inquiry before deciding whether to confirm the order. It seems to me that the language used indicates an intention on the part of the Legislature to confer the right upon the Minister, when he has caused the public inquiry to be held, to deal with the report which comes to him from the holder of the inquiry, and to give his own consideration to objections which are not withdrawn, and to do nothing more. It is to be observed that there is nothing in the Act or the Schedule thereto which prevents reasonable objections from being put forward, and there is no evidence here that any application was made to the Minister to consider any further arguments in support of the objections which were made, and indeed it was agreed that there was no such application. According to the evidence the point that was specifically reserved for the consideration of the Minister was the validity of the reservations in these various conveyances. That was a point, it seems to me, which might have been very material if the question to be considered had been how much compensation the applicant should receive, but which has little or no bearing on the question whether the order authorizing the compulsory purchase of this land should or should not be confirmed.

For these reasons I think that this application should be dismissed.

Application dismissed.

Solicitors for the applicant: *Emmet & Co., for Gunner, Wilson & Jerome, Newport, Isle of Wight.*

Solicitor for the respondent: *Solicitor to Ministry of Health.*

J. R.

1935
April 8.

THE KING *v.* SANDBACH.

Ex parte WILLIAMS.

Justices—Powers—Statutory Offence—Repetition of Offence apprehended—Fine prescribed by Statute no deterrent—Recognizance to be of good Behaviour in lieu of Fine—Preventive Justice—Discretion of Magistrate—Justices of the Peace Act, 1360 (34 *Edw.* 3, *c.* 1)—*Prevention of Crimes Act,* 1871 (34 *&* 35 *Vict. c.* 112), *s.* 12—*Prevention of Crimes Amendment Act,* 1885 (48 *&* 49 *Vict. c.* 75), *s.* 2.

The applicant was convicted of obstructing a police constable in the execution of his duty, by warning a street bookmaker of the approach of the police and so enabling him to evade arrest. Evidence was given at the police court that the applicant had already been convicted of similar offences several times and that the infliction of a fine was no deterrent. The magistrate ordered the applicant to enter into a recognizance to be of good behaviour in the sum of 20*l.* with two sureties of 10*l.* each, or in default to be imprisoned for two months. The applicant sought a rule for a certiorari to quash the magistrate's order on the ground that the magistrate had no jurisdiction to make it, because (1.) there was no actual or apprehended breach of the peace, by, or as a result of the conduct of the applicant, and (2.) the order, in effect, imposed a penalty different from and possibly more severe than the maximum which would be imposed for the offence of which the applicant was actually convicted:—

Held, that the rule must be discharged, because the matter was within the discretion of the magistrate, who had exercised his discretion properly.

Lansbury v. *Riley* [1914] 3 K. B. 229 followed.

RULE NISI for a certiorari.

The rule nisi called on Mr. J. B. Sandbach, the Metropolitan Magistrate, to show cause why an order made by him against the applicant, Henry Williams, on July 10, 1934, should not be quashed. Williams was charged with obstructing a police constable in the execution of his duty, contrary to the Prevention of Crimes Act, 1871, s. 12, as extended by the Prevention of Crimes Amendment Act, 1885, s. 2, by warning a street bookmaker of the approach of the police and so enabling the bookmaker to evade arrest. The magistrate convicted the applicant of that offence and no complaint was made of that conviction.

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Evidence was then given by the police that the applicant had been convicted of similar offences three times in 1933, once in January and four times in February, 1934, and that the infliction of a fine was no deterrent. Thereupon, Mr. Sandbach made an order requiring the applicant to enter into a recognizance for good behaviour in the sum of 20*l.*, with two sureties of 10*l.* each, or in default to be imprisoned for two months.

The grounds on which it was sought to quash this order were (1.) that the magistrate had no jurisdiction to make the order because there was no allegation or evidence of any actual or apprehended breach of the peace by the applicant or any other person as a result of any conduct of the applicant; and (2.) that the magistrate had no jurisdiction to make the order, because it in effect imposed on the applicant a penalty different from and possibly more severe than the maximum which could be imposed for the offence of which he was actually convicted—namely, a fine of 5*l.*

R. M. Montgomery K.C. and *G. G. Raphael* showed cause. The rule ought to be discharged. The magistrate had jurisdiction to require the applicant to enter into a recognizance to be of good behaviour: see *Lansbury* v. *Riley.* (1) The recognizance to be of good behaviour is not in the nature of a penalty but is rather in the nature of an injunction to restrain an apprehended breach of the law. Under this head of preventive justice magistrates are invested with large discretionary powers to require those persons whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour: see Blackstone's Commentaries, vol. iv., p. 251. Where the statutory penalty proves inadequate or ineffective to prevent the repetition of the offence, there is power to require a recognizance for good behaviour as an ancillary remedy. See the analogous

(1) [1914] 3 K. B. 229.

case where an injunction may be granted at the suit of the Attorney-General: *Attorney-General* v. *Sharp*. (1)

Comyns Carr K.C. and *F. H. Curtis Bennett* in support. It is conceded that in every case in which there is reason to apprehend a breach of the peace the power exists to require a defendant to enter into a recognizance. But the question here is whether that power exists in a case where there is no reason to apprehend a breach of the peace. It is submitted that the power to require recognizances to be entered into, whether to keep the peace, or to be of good behaviour, is limited to cases which involve or tend to a breach of the peace in the sense of something calculated to lead to violence. Moreover, whatever may have been the old rule with regard to certain offences at common law, where a new offence is created by statute and the penalty is there laid down, there is no power to bind over in addition to, or in lieu of, the statutory penalty. The magistrate's order in this case imposes on the applicant a greater penalty than that laid down in the statute for the particular offence. There are a number of comparatively recent statutes in which the power to bind over is expressly given. But this case is not within any of those statutes. If, as is contended for in this case, the power to bind over, or to order recognizances to be entered into to be of good behaviour, exists apart from statute, the express power given by certain statutes would not be necessary. Where an offence is the creature of a statute, there is no power to order recognizances unless such power is expressly given by the statute by which the offence is created or by some other statute. In the case of a common law misdemeanour a High Court judge has power to order recognizances to be entered into to keep the peace, but a magistrate has no such a power. The power of magistrates to bind over to keep the peace or to be of good behaviour rests on the statute 34 Edw. 3, c. 1, and is limited to the class of case there referred to. Under the Probation of Offenders Act, 1907, in default of sureties, the offender is merely liable to the

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(1) [1931] 1 Ch. 121.

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statutory penalty for the offence charged against him. The statement in Archbold's Criminal Pleadings, 29th ed., at p. 246, that a person convicted of any misdemeanour, whether at common law or by statute, may be required to enter into a recognizance to keep the peace is too general. In modern times the question of a breach of the peace or the apprehension of a breach of the peace has been treated as the test of whether the power exists to order recognizances. In all the cases where such an order has been made there was either violence or a reasonable apprehension of violence. [The following authorities were referred to: *Reg.* v. *Dunn* (1); *Rex* v. *Trueman* (2); *Haylock* v. *Sparke* (3); *Institute of Patent Agents* v. *Lockwood* (4); *Rex* v. *Little and Dunning* (5); *Wise* v. *Dunning* (6); *Rex* v. *Wilkins.* (7)] The point of *Lansbury* v. *Riley* (8) is that there was an incitement to commit a breach of the peace. There is no reported case which negatives the general conclusion that a breach of the peace or a reasonable expectation or apprehension of a breach of the peace is a condition precedent to the magistrate's power to require recognizances to be entered into to keep the peace or to be of good behaviour, where the statute has prescribed a limited penalty for the offence. The power of the magistrates in this respect ought not to be enlarged. The rule ought to be made absolute.

LORD HEWART C.J. I am clearly of the opinion that this rule ought to be discharged. There is no need to reiterate the facts which have been put before the Court. This case is covered in all material respects by *Lansbury* v. *Riley* (8), and especially by the judgment of Avory J.

Counsel who argued in support of the rule asks, if this action by the magistrate be permissible, in what way can that power be limited? The answer I give is that the matter is discretionary and the limits are to be found in

(1) (1847) 12 Q. B. 1026, 1031.
(2) [1913] 3 K. B. 164.
(3) (1853) 1 E. & B. 471.
(4) [1894] A. C. 347, 361.
(5) (1909) 74 J. P. 7.
(6) [1902] 1 K. B. 167.
(7) [1907] 2 K. B. 380.
(8) [1914] 3 K. B. 229.

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discretion. We should assume that judicial powers, when given, will in all cases be exercised properly, as they have been in this case.

AVORY J. I am of the same opinion, and in view of the judgment of my Lord I do not think it right to add anything to what I am reported to have said in *Lansbury* v. *Riley*. (1) In view, however, of the argument of Mr. Comyns Carr, which undoubtedly, at first sight, is impressive, namely, that the effect of what has been done in this case is to increase the penalty which has been fixed by statute for a particular offence, I must say I am not prepared to assent to his proposition that there can be no binding over of a person to be of good behaviour unless he has done something which tends to a breach of the peace in the sense of something which is calculated to lead to violence, that is, to personal violence. In my view, the phrase "calculated to lead to a breach of the peace" is far more extensive in its meaning than Mr. Comyns Carr has suggested. If further authority is wanted, I think the passage from Blackstone, vol. iv., p. 251, shows that the scope of this remedy is what is called preventive justice. The passage reads: "This preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour."

With that addition I content myself with saying that I am in agreement with the judgment delivered by Lord Hewart C.J.

HUMPHREYS J. I also agree. Mr. Comyns Carr has argued that the power of a magistrate to order a person to enter into recognizances to find sureties to be of good behaviour is confined to cases where there is apprehension of a breach of the peace in the sense of violence towards some person. In my view it is quite impossible to accept that argument without differing from and refusing to agree with a very important chapter in Blackstone.

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(1) [1914] 3 K. B. 229.

Avory J. has referred to some words by that great author in vol. iv., chapter 18. I only desire to read a few more words. After dealing with such matters as the nature of this security, how it may be demanded and how it may be discharged and when it is grantable, on p. 256, vol. iv., the learned author says: "The other species of recognizance, with sureties, is for the *good abearance* or *good behaviour.* This includes security for the peace, and somewhat more; we will therefore examine it in the same manner as the other. First then, the justices are empowered by the statute 34 Edw. III., c. 1, to bind over to the good behaviour towards the king and his people, all them *that be not of good fame,* wherever they be found; to the intent that the people be not troubled nor endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, *that be not of good fame,* it is holden that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores,* as well as *contra pacem.*"

I cannot think that the expression against the peace or apprehension of a breach of the peace is confined to a breach or apprehension of a breach of that part of the law which provides that persons shall not commit assaults, and I think that the distinction which is there drawn by Blackstone is the distinction between such matters as are contrary to morality (contra bonos mores) and such matters as are contrary to law (contra pacem). Blackstone says in terms that a magistrate may properly bind over a person in any case where it is apprehended that it is likely he will commit a breach of the peace or that he will do something against the law. That in my judgment is the law, and it is too late, in 1935, to attempt to show that Blackstone was wrong.

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I therefore agree with the judgments delivered by Lord Hewart C.J. and Avory J.

Rule discharged.

Solicitors showing cause: *Wontner & Sons.*
Solicitor in support: *Lucien Fior.*

T. W. M.

Applied. THORPE *v.* FASEY. [1949] Ch. 649

C. A.

1935
May 21, 22.

HAROLD WOOD BRICK COMPANY, LIMITED *v.* FERRIS.

[1934. H. 837.]

Vendor and purchaser—Contract for purchase of freehold premises—Right of vendor to resell on purchaser's failure to complete—Repudiation of contract—Vendor's right to recover damages.

The defendant entered into an agreement to purchase certain freehold land and buildings together with the machinery, plant and utensils thereon. Clause 15 provided for completion on August 31, 1933, with an option to the defendant to complete earlier at a less price and " if for any reason the actual completion of the purchase is delayed beyond August 31, 1933, then nevertheless on that date the purchase money . . . . shall be placed on deposit . . . . but the purchase shall in any event actually be completed not later than September 15, 1933. . . . ." Clause 16 provided: " Should the purchaser fail to complete the said purchase in accordance with this agreement any deposit paid by the purchaser shall be forfeited to the vendors who may rescind the sale and resell the property either by public auction or private contract subject to such stipulations as they may think fit."

The defendant failed to complete the purchase in accordance with the agreement:—

Held, that the date, September 15, 1933, fixed for completion was of the essence of the contract, and that as the defendant had failed to complete the purchase and had made it plain that he was unable to do so the plaintiff was entitled to treat the contract as broken and to claim the damages suffered by the breach of contract.

Lord Parker's dictum in *Stickney* v. *Keeble* [1915] A. C. 386 at p. 416 applied by Slesser L.J.

Decision of Swift J. [1935] 1 K. B. 613 affirmed.

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HAROLD WOOD BRICK CO. v. FERRIS.

APPEAL from a decision of Swift J.

By an agreement dated August 15, 1933, made between John Casburn Pidgeon, the liquidator of the Harold Wood Brick Company, Ld., and Arthur Ferris, the liquidator agreed to sell and Arthur Ferris agreed to buy certain freehold land and buildings at Church Road, Harold Wood, Essex, which had been used as a brickfield, together with certain machinery, plant and utensils. The agreement provided that the purchase price of the whole brickmaking undertaking should be 9500*l*. Clause 15 of that agreement provided as follows :—

" (1.) Payment of the purchase money of 9500*l*. and completion of the purchase shall take place on August 31, 1933, at the offices of the vendors' solicitors, Messrs. Reynolds, Sons & Gorst, 7, Arundel Street, Strand, W.C.2, or the purchaser may at his option complete the purchase on August 15, 1933, at the said offices in which event the purchase price to be paid by him shall be 9000*l*. instead of 9500*l*.

" (2.) If the purchaser's solicitors give notice to the vendors' solicitors (not later than August 15, 1933) and with such notice pay 20 per cent. of the purchase price of 9500*l*. to the vendors' solicitors as a deposit and on account of the purchase money the purchaser shall be let into possession of the property as tenant at will of the vendors the purchaser paying from such date interest at 5 per cent. per annum on the balance of the purchase money and paying and being responsible for all rates taxes assessments duties charges rents liabilities and outgoings whatsoever in respect of the property and keeping the property in as good a state of repair and condition as it was at the time of taking possession.

" (3.) If for any reason the actual completion of the purchase is delayed beyond August 31, 1933, then nevertheless on that date the purchase money of 9500*l*. (less the amount, if any, the purchaser may have paid on account thereof in respect of being given possession as a tenant at will as hereinbefore provided) shall be placed on deposit at the Westminster Bank, Ld., Aldwych Branch, W.C.2, in the joint names of the vendors' solicitors and the purchaser's solicitors but the purchase shall in any event actually be completed not later than September 15, 1933. The purchaser shall also pay to the vendors interest at the rate of five per cent. per annum from August 31, 1933, until actual completion on the said sum of 9500*l*. or lesser amount as aforesaid any bank deposit interest received by the vendors to be credited as on account of such interest."

Clause 16: "Should the purchaser fail to complete the said purchase in accordance with this agreement . . . . any deposit paid by the purchaser shall be forfeited to the vendors who may rescind the sale and resell the property either by public auction or private contract subject to such stipulations as they may think fit."

The defendant failed to complete the purchase in accordance with the agreement. On November 13, 1933, the liquidator's solicitors wrote to the defendant saying: "In view of the fact that you have not completed the purchase . . . . in accordance with the contract . . . . our clients instruct us to give you notice that they rescind the contract and are proceeding to sell the property by tender. They will hold you responsible in damages for any loss occasioned to them by your breach of the agreement."

Subsequently, the liquidator issued a writ claiming damages for breach of the agreement of August 15, 1933. It was agreed between the parties that if the defendant was liable the damages were 4990*l*.

Swift J. held that the vendor was not limited to his right to resell under clause 16 of the agreement, but was entitled to claim damages at common law for the defendant's breach of his contract to purchase the premises in question. He accordingly gave judgment for the plaintiff.

The defendant appealed.

R. F. Roxburgh K.C., *Valentine Holmes* and *T. G. Roche* for the appellant. There is no case in which a vendor who has given notice of rescission of a contract has afterwards recovered damages for non-performance by the purchaser. In equity a vendor cannot obtain rescission and also claim damages. In this case except for the fact that the purchaser did not pay the purchase money on the stipulated date there was no repudiation by him of the contract so as to entitle the vendors to damages. *Cornwall* v. *Henson* (1) shows that a provision for the payment of the purchase money by a specified date, if broken, does not justify a repudiation of the contract by the vendor. The principle applicable was stated thus by Lord Selborne in *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* (2): "I am content to take the rule as stated by Lord Coleridge in *Freeth* v. *Burr* (3) which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part." In *Stickney* v. *Keeble* (4) Lord Parker pointed out that although the time fixed by the parties for completion had always been regarded at law as of the essence of the contract, the matter was not regarded in the same light in equity and accordingly, courts of equity would, where they could do so without injustice, decree specific performance notwithstanding failure to complete by the stipulated date, and would restrain proceedings at law to recover damages based upon such failure. In this case there was no unreasonable delay on the part of the purchaser justifying the action of the vendors. Moreover, clause 16 of the agreement does not confer upon the vendors a right to claim damages for a breach by the purchaser; the only penalty provided for is the forfeiture of any deposit, and in this case no deposit was paid. The real object of clause 16 was to assist the vendors in realizing the property more quickly than otherwise they could do. The word "rescind" in that clause

(1) [1900] 2 Ch. 298.
(2) (1884) 9 App. Cas. 434, 438.
(3) (1874) L. R. 9 C. P. 208.
(4) [1915] A. C. 386, 415.

should be construed as not involving a right to claim damages. *Henty* v. *Schröder* (1), *Hutchings* v. *Humphreys* (2) and *Jackson* v. *De Kadich* (3) establish the proposition that if a decree for specific performance is made and is not carried out a court of equity will not give damages for breach of the contract as well as rescission.

Vaisey K.C. (*Done* with him) for the respondents. In equity time will be deemed of the essence of the contract in all cases where it can be collected from the terms of the contract that the parties intended that the time for its completion should be strictly adhered to: *Hipwell* v. *Knight.* (4) In this case clause 15 of the agreement clearly makes the date for completion of the essence of the contract. After stating two optional dates it makes September 15 the peremptory date, and as the purchaser did not complete on that date he must be taken to have repudiated the contract, and thereupon a right to damages accrued to the vendors automatically. As is said in Webster on Conditions of Sale (3rd ed.), p. 419: "in the absence of any condition the vendor is, upon the purchaser's default, entitled to re-sell and to recover in addition to his expenses any deficiency of price on the re-sale as damages against the purchaser."

[He was stopped.]

T. G. Roche in reply. In order that the date stated for completion may be of the essence of the contract, one specific date must be limited and that has not been fixed in this case. Further, clause 16 does not entitle the vendors to rescind and also to claim damages. It is usual, as is said in Williams on The Contract of Sale of Land (p. 92), to insert an express provision where the intention is to give the vendor a right to damages. In the absence of such a provision it is submitted that no such right exists.

GREER L.J. In this case Mr. Roche in his reply has had to meet a somewhat difficult situation in view of expressions by members of the Court indicating that they were much impressed by the arguments presented on behalf of the respondents, but he has performed his task extremely well.

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(1) (1879) 12 Ch. D. 666.
(2) (1885) 54 L. J. Ch. 650.
(3) [1904] W. N. 168.
(4) (1835) 1 Y. & Coll. 401.

The question is whether Swift J. was right in holding that the defendant was liable to pay damages for his failure to perform a term which was of the essence of the contract. The argument presented to Swift J. was not quite the same as that presented to us, and in view of that the language used by the judge was not that which he would have used if the argument presented to us had been addressed to him. That, however, is immaterial, for if the decision given by him was right it does not matter that he may not have dealt with all the points argued before us. In my opinion the judge was right in holding that the defendant was liable to pay damages for his breach of a term which went to the root of the contract.

The agreement in question, dated August 15, 1933, although in form for the sale of land, was really for the sale of land which had been developed for the purpose of a brickfield, together with the tools of trade thereon, some of them of very considerable value. Whether that would have made the date of completion, if there had been one date only, of the essence of the contract both in equity and in law I do not decide, as in this case it is unnecessary to consider the point. What we have to consider is the effect of clauses 15 and 16. If in clause 15 there had been nothing but the date for completion primarily fixed for August 31, 1933, there might be some difficulty in saying that the time so fixed should be regarded in equity as well as at law as of the essence of the contract; but there are two other dates mentioned. By sub-clause 2 of clause 15 the purchaser, if notice is given on his behalf to the vendors' solicitors not later than August 15, 1933, and with such notice a deposit of 20 per cent. of the purchase price as a deposit and on account of the purchase money, is to be let into possession as tenant at will, paying interest on the balance of the purchase money. If that clause were complied with the date August 31 could not be deemed of the essence of the contract; but sub-clause 3

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of clause 15 proceeds thus: "If for any reason the actual completion of the purchase is delayed beyond August 31, 1933, then nevertheless on that date the purchase money of 9500*l.* (less the amount if any the purchaser may have paid on account thereof in respect of being given possession as a tenant at will as hereinbefore provided) shall be placed on deposit . . . . in the joint names of the vendors' solicitors and the purchaser's solicitors but the purchase shall in any event actually be completed not later than September 15, 1933. The purchaser shall also pay to the vendors interest . . . . from August 31, 1933 until actual completion . . . ." I might have been inclined to the view that that clause was peremptory and if the money was not paid on the date mentioned that would be a ground entitling the vendor to say: "You have not performed that which is an essential term of the contract." It is, however, unnecessary to determine that in view of the words of that sub-clause —namely, "but the purchase shall, in any event, actually be completed not later than September 15, 1933," that is to say, even though the money has been paid into the joint names within the first part of the clause, the purchase is to be completed not later than September 15. I agree with the contention that the only way in which effect can be given to these special words is to make completion by September 15 a condition which is of the essence of the contract, and that it would have been so held in a court of equity as well as in a court of law. That is sufficient to dispose of this case, because it is established beyond question that by September 15 and for some time thereafter the purchaser failed to complete.

There are other reasons which lead me to the conclusion that the time fixed for final completion was of the essence of the contract. Notwithstanding that my brethren may not take the same view as I do of clause 16, I think that that clause in itself indicates that the parties intended that the time fixed for final completion should be of the essence of the contract. Parties may say by express words that notwithstanding any rule of law or equity to the contrary, time shall be of the essence of the contract; or they may use words which in substance mean the same thing. If they say, as in this case they did, in clause 16, that if the purchaser fails to complete the purchase "in accordance with this agreement," the vendors may rescind the sale and resell the property, they are thereby saying that the effect of non-performance of what is an essential term of the contract is that there shall be, what otherwise there could not be, a rescission by the other party. It is unnecessary to consider the words following except for the purpose of showing that there are agreed terms as to how damages are to be estimated if the contract is rescinded by reason of a breach of an essential term. The effect of these words is that if the vendor was measuring his damages by reason of the loss on a resale by auction it could not be said by the person in default, "If you had waited, and instead of selling by auction you had sold by private contract, you would have realised a larger price"; nor could it be said, "You cannot recover as damages the difference between what you have received and what you would have received under the contract because you have inserted stipulations in the particulars which you should not have inserted." True effect is given to those words by assuming that they were inserted for that purpose and not for giving support to the contention that the only rights of the vendor under clause 16 are to claim the forfeiture of the deposit, if one has been made, or, if there has been no deposit, the mere rescission of the contract. That appears to me an unreasonable interpretation to put upon clause 16, but I base my judgment mainly, if not exclusively, on the terms of clause 15.

For these reasons Swift J. was right in the conclusion he arrived at, and it is not necessary to enter into the question whether if time had not been of the essence of the contract the conduct of the purchaser when pressed to keep himself up to date would have been sufficient to indicate that he would not be able to perform his contract. If one party indicates by his conduct that he is unable or unwilling, whatever time is given, to perform his contract, that is sufficient to justify an acceptance of the repudiation and to entitle the other party to damages, and I base my judgment on the fact that a term which was of the essence of the contract has been broken by the appellant and therefore he is liable for the damages given against him. The appeal will be dismissed.

SLESSER L.J. I have come to the same conclusion. At common law, before the Judicature Act, 1873, the time fixed for completion was of the essence of the contract.

In *Macbryde* v. *Weekes* (1) Sir John Romilly M.R. said (2) that " the difference [is] very marked between law and equity, so far as regards this question; law only considering time as of the essence of the contract, when it is expressly specified, whatever may be the condition of the parties and the property, but equity considering time essential in those cases only, in which injury would be inflicted upon one party by disregarding it." But by s. 25, sub-s. 7, of the Act of 1873, and now by s. 41 of the Law of Property Act, 1925, it is provided that " stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules."

Therefore after the Judicature Act the mere fact that there is a date for completion stated in the contract is not of itself decisive that time is of the essence of the contract, but the mere fact that in equity it is not decisive, does not necessarily lead to the conclusion that in a particular case the date mentioned for completion is not even now of the essence of the contract. Thus, Lord Parker, in *Stickney* v. *Keeble* (3) said that the maxim that in equity the time fixed for completion is not of the essence of the contract " never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated

(1) (1856) 22 Beav. 533.
(2) Ibid. 540.
(3) [1915] A. C. 386, 416.

that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract." In my opinion both conditions mentioned by Lord Parker are fulfilled in this case, for here the stipulation as to time cannot be disregarded without injustice to the plaintiffs. By this contract the purchaser was given considerable latitude. He primarily contracted to complete on August 31, 1933, but if he completed not later than August 15 he was to get a certain abatement of the price. By sub-clause 3 of clause 15 it is provided that "if for any reason the actual completion of the purchase is delayed beyond August 31, 1933, then nevertheless on that date the purchase money of 9500*l.* (less the amount if any the purchaser may have paid on account thereof in respect of being given possession as a tenant at will as hereinbefore provided) shall be placed on deposit . . . . in the joint names of the vendors' solicitors and the purchaser's solicitors, but the purchase shall in any event actually be completed not later than September 15, 1933. The purchaser shall also pay to the vendors interest at the rate of five per cent. per annum from August 31, 1933, until actual completion on the said sum of 9500*l.* or lesser amount as aforesaid any bank deposit interest received by the vendors to be credited as on account of such interest." That concession given to the purchaser to delay completing beyond August 31 by the payment of certain interest seems to me to make it clear that the intention of the parties was that in return for that concession the purchaser would in any event finally complete by September 15, and therefore I think, to use the language of Lord Parker, that it would work an injustice if September 15 were not to be regarded as the final date for completion. That in my opinion is sufficient to decide this case; but there is I think sufficient evidence contained in the agreement itself that the property, the subject of the contract, was not merely a freehold piece of land but was land with kilns, etc., thereon. Being thus a property intended to be used for trade purposes it would be inequitable to treat the time for completion otherwise than as of the essence of the contract. That being so, and the letters showing, and the judge having found, that the defendant repudiated the contract, it follows that he was liable in damages. The argument submitted to Swift J. appears to have been based solely on clause 16, that the vendor having elected to proceed under that clause was entitled to no more than a right to forfeit the deposit (if there was one) and resell the property. For myself I express no concluded opinion upon that clause, which is difficult and is capable of varying interpretations, more particularly as in clause 15 I find sufficient ground for saying that it would work an injustice if the time for completion which is stated were not treated as of the essence of the contract. All that is required to be established by the vendor on the repudiation by the purchaser has been established.

ROCHE L.J. I agree that the appeal should be dismissed and I agree that it is established that September 15, described as the date for final completion, was of the essence of the contract. Further, I agree that the purchaser, the defendant, had by November 13 failed to complete the purchase and had made it plain that he was unable or unwilling to do so then or at all. In those circumstances, the liquidator, the plaintiff in the action, was entitled, as he purported to do, to treat the contract as broken by the defendant in an essential term, and was therefore entitled to maintain his action for damages, the amount of which had been agreed. For that amount the plaintiff recovered judgment, and that judgment he is entitled to retain. I have stated my reasons for arriving at my conclusion thus compendiously because I wish, as Slesser L.J. has done, to reserve for further consideration all questions arising on clause 16. In my judgment the plaintiff did not require to nor did he avail himself of the stipulations in that clause. He proceeded on his common law right irrespective of that clause. I make that reservation not merely because of the difficulties arising on the construction of clause 16 but because of its obvious similarity to certain provisions in the Lord Chancellor's Rules in connection with contracts for the sale of land provided for under s. 46 of the Law of Property Act, 1925. The very interesting discussion which took place in the argument of this case touching this point shows that all writers do not agree about it and one very eminent writer appears to have modified his views from time to time upon the effect of clause 16 and upon some of the conditions in the Lord Chancellor's Rules. Those matters therefore I think it unnecessary to deal with.

Appeal dismissed.

Solicitors for appellant: *Andrew, Purves, Sutton & Creery.*
Solicitors for respondents: *Reynolds, Sons & Gorst.*

J. S. H.

ATTORNEY-GENERAL *v.* VALLE-JONES.

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Feb. 7.

Master and Servant—Crown Servant—Member of Royal Air Force—Injury to by tortfeasor—Continued payment of wages to injured man during incapacity—Medical treatment in Air Force Hospital—Claim by Crown against tortfeasor for loss of service—Damages—Amount of wages and hospital expenses.

As the result of a collision between a motor-lorry belonging to the defendant and a motor-cycle, which was caused by the negligence of the defendant's driver, two aircraftsmen of the Royal Air Force who were riding on the motor-cycle sustained injuries which rendered them for a time incapable of service. The men recovered damages against the defendant in which no sum was included for loss of wages or rations or for medical expenses, because their wages and rations had been continued during their incapacity and they had received treatment in a Royal Air Force hospital. On a Crown information against the defendant in that behalf:—

Held, that the Crown was entitled to maintain a claim against the defendant for loss of service of the men by the tortious act of his driver, and to recover any damage which it had thereby suffered; and that the measure of that damage was the amount of the wages and rations of the men during their incapacity and of the expenses of their hospital treatment, the amount of which payments, allowances and expenses, if they had not been borne by the Crown, could have been recovered by the men from the defendant as damages.

Admiralty Commissioners v. *S.S. Amerika* (*Owners*) [1917] A. C. 38, 60, 61, observations explained and held inapplicable.

LATIN INFORMATION by the Attorney-General on behalf of the Crown.

At all material times J. D. Hull and N. W. Verney were in His Majesty's service as aircraftsmen in the Royal Air Force.

On December 5, 1930, on the Bedford Road, Shefford Hardwicke, in the county of Bedford, a collision took place between a motor-cycle on which Hull and Verney were riding and a motor-lorry belonging to Mr. F. W. Valle-Jones, the defendant, and driven by his servant, as the result of which Hull and Verney suffered severe personal injuries, incapacitating them for a time from work.

Each of the injured men during the period of his incapacity continued to receive his service pay and rations and underwent treatment in a Royal Air Force hospital.

The injured men had made claims against the defendant in respect of their injuries and had recovered damages from him, which, however, could not in the circumstances include any sum for loss of wages or for hospital expenses.

By the information, which was dated May 18, 1934, the Attorney-General, on behalf of His Majesty, informed the Court that Hull and Verney suffered the said injuries by the negligence of the defendant and were rendered incapable of performing their duties in His Majesty's service, the former from December 5, 1930, to January 7, 1932, and the latter from December 5, 1930, to January 5, 1931, and from January 8, 1931, to January 28, 1931, whereby His Majesty had lost their services and all advantage which would otherwise have accrued to him therefrom on and between these respective dates, and had been put to other expense in and about the premises; the particulars of loss being in the case of Hull for loss of his services as measured by his pay and rations during his period of incapacity 105*l.* 17*s.* 10*d.*, and for his hospital treatment 191*l.* 16*s.* 5*d.*, and in the case of Verney for loss of his services similarly measured 14*l.* 9*s.* 11*d.*, and for his hospital treatment 14*l.* 14*s.* 6*d.*; and the Attorney-General claimed the total of these amounts—namely, the sum of 326*l.* 18*s.* 8*d.*, and prayed that that sum might be adjudged to His Majesty.

The defendant for plea said that while he admitted that Hull and Verney were injured as alleged and that His Majesty lost their services by reason of their injuries, and incurred the expenses mentioned in the information, he (the defendant) was not liable to His Majesty in the sum claimed or any part thereof in manner and form as in and by the information was charged against him, and of that he put himself upon the country.

The informant by his replication joined issue upon the plea.

Sir Donald Somervell S.-G. and *Wilfrid Lewis* for the informant:

The Crown has a right to the relief prayed by the information. It is entitled to maintain a claim against the defendant for the injury it has suffered by the loss of service of the two aircraftsmen by the negligence of the defendant's driver, and to recover any damage resulting therefrom. It is a principle of the common law that a master may maintain an action for the loss of service of his servant by the tortious act of another person: *Hall* v. *Hollander* (1), per Abbott C.J. Even a slight amount of service will suffice to support the action, as appears from the particular class of cases based on this principle in which a parent as the employer of his daughter brings an action against her seducer: *Grinnell* v. *Wells* (2) and *Evans* v. *Walton* (3), and it is enough to show that the relationship of master and servant exists between the plaintiff and the person whose work is affected without proving a binding contract of service between them: *Evans* v. *Walton.* (3) The action for loss of service is no less available

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(1) (1825) 4 B. & C. 660.

(2) (1844) 7 Man. & G. 1033.

(3) (1867) L. R. 2 C. P. 615.

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to the Crown than to any other employer of labour. For the calculation of the damages in an action of that kind all the circumstances of the case may be taken into consideration: per Abbott C.J. in *Hall* v. *Hollander*. (1) The measure of damage sustained by the Crown for loss of service of these men is the amount of their wages and rations during the period of their incapacity; and this would be the same whether the Crown continued to pay the men or not, and whether the Crown hired new men to do the work of these men or had that work done by other members of the force, or left it undone: see *Martinez* v. *Gerber*. (2) The measure of damage sustained by the Crown in respect of the hospital treatment of the men is the expense of that treatment. That expense was necessitated by the wrongful act of the defendant's driver, and the Crown has incurred it without getting any equivalent for it. The Crown by continuing the men's wages and rations and incurring these hospital expenses did not make mere voluntary payments. It is true that servants of the Crown hold office only during the pleasure of the Crown: *Dunn* v. *The Queen* (3); that even an engagement by the Crown with an officer cannot be enforced in the Courts: *Mitchell* v. *The Queen* (4); and that by the contract of service between the Crown and a member of the Royal Air Force, the terms of which are contained in the Royal Air Force Regulations, 1928, the Crown has power to dismiss a member of the force at will. The Crown cannot, however, for reasons of convenience and policy, exercise that power of immediate dismissal and refuse to make such payments in the case of an injured member of one of the service forces who might recover, because the trained men of these forces cannot be replaced by others without the cost and delay of training the latter, and the summary dismissal of such men would damage the reputation of the Crown and prejudice the service concerned: see *James Finlay & Co.* v. *N. V. Kwik Hoo Tong H. M.* (5), and because the making of these payments serves as

(1) (1825) 4 B. & C. 660.

(2) (1841) 3 Man. & G. 88; 3 Scott (N. R.) 386.

(3) [1896] 1 Q. B. 116.

(4) (1890) [1896] 1 Q. B. 121, *n.* (2).

(5) [1929] 1 K. B. 400, 410, 415.

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an inducement to other suitable men to join the service: see *Bradford Corporation* v. *Webster* (1); and it is further to be observed that by the Royal Air Force Regulations, 1928, reg. 1528, all airmen are entitled to medical attendance and hospital treatment at the public expense. Even if these payments were voluntarily made by the Crown, that is no reason why the Crown should not recover the amount of them as damages from the defendant, because the Crown may be regarded as under a moral obligation to make the payments, and, moreover, their voluntary character cannot affect their value to the men: see per Younger L.J. in *Baker* v. *Dalgleish Steam Shipping Co.* (2) It cannot be disputed that a person aggrieved by an injury is not entitled to increase his claim for damage by any voluntary act: see *Admiralty Commissioners* v. *S.S. Amerika* (*Owners*) (3). But the Crown by paying the wages of these men and bearing their hospital expenses did not increase the damages of the defendant, because these wages and expenses are the exact measure of the damages which the defendant would otherwise have had to pay. If the Crown had mitigated its claim for damages against the defendant by dismissing these men when they became incapacitated the men could have recovered the amount of these wages and expenses from the defendant as damages. The Crown by making these payments was incurring a loss which should have been borne by the defendant, and it is entitled to recover the amount of them from the defendant in this action as damages.

J. Alan Bell for the defendant:

The informant is not entitled to the relief claimed against the defendant. It is not denied that an action for loss of the services of a servant by the tortious act of a third party is available to the Crown as an employer as well as to a subject. The Crown as plaintiff in such an action has no greater rights than an ordinary employer by reason of the fact that public opinion may demand that it should observe a high standard of conduct towards its servants. The measure of damages recoverable in the action depends upon the particular circumstances of the case. As to loss of service, where an apprentice is injured by a wrong-doer and his master maintains him during his incapacity and employs a substitute to do his work, the measure of damages would clearly be the wages paid to the substitute. The case is different, however, where a soldier, sailor, airman or other employee of the Crown is so injured, because the Crown, having many other members of the force available to do the injured man's work, need not employ an outside substitute. The Crown may sustain some damage, but the measure of it is not necessarily the wage of the injured man or of a substitute. As regards the hospital treatment of the injured men the measure of damages is not the medical expenses incurred by the Crown in respect of these men. The Crown provides a medical service for the members of the air force, just as many large private concerns such as shipyards and collieries may maintain such services for their employees. If an employee of a concern of that sort was injured by a tortfeasor and taken to its hospital his employers could not as a matter of course recover as damages the whole expenses of his treatment in that hospital, because there might have been a public hospital available where the man might have been treated at less expense or even free of expense, and, similarly, the Crown cannot recover damages equal to the full expenses of the treatment which these men received in a Royal Air Force hospital. The fact that the air force hospital may have been the nearest available is no reason why the expenses there should be the measure of damages. The damages already recovered by these men against the defendant presumably included the expenses of his medical treatment.

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(1) [1920] 2 K. B. 135, 143.

(2) [1922] 1 K. B. 361, 380.

(3) [1917] A. C. 38.

[*Sir D. Somervell S.-G.* In the Crown's claim there is no duplication of any item of damage recovered in the former action.]

The Royal Air Force Regulations, 1928, reg. 1531, provides that where no accommodation in an air force, naval, or military hospital is available, an airman may be admitted to a civil hospital on the best terms available ;

and that provision seems to show that it is not a costly medical treatment that is contemplated, but the least expensive that is consistent with efficiency. The provision of medical service is not an incident of the contract between the Crown and the aircraftsman, but is a matter of grace. The case of *Bradford Corporation* v. *Webster* (1) is not applicable to the present case. In that case a constable in the service of a municipal corporation was injured by a third person, and in an action by the corporation against that person it was held that the corporation could recover as damages the amount of the constable's wage and increased pension, because the payment of these sums was necessary to attract constables to the service of the corporation; but it cannot be said that a man is more strongly attracted to join the air force because medical treatment is provided for it.

Sir D. Somervell S.-G. in reply.

MacKinnon J. This case is a sequel to a collision between a motor-lorry driven by the servant of the defendant and a motor-cycle on which two aircraftsmen in the Royal Air Force were riding. The collision was due to the negligence of the defendant's servant, and it caused injury to the two aircraftsmen which incapacitated them from working for a time. As the result of that negligence the injured men had a claim against the defendant for damages, which in the ordinary case would include any loss of wages during their incapacity and also the cost of any hospital treatment and medical attendance reasonably incurred. The injured men did make a claim against the defendant in which they recovered damages, but those damages cannot have included any sum in respect of loss of earnings, because in fact during the period of their incapacity they continued to receive their pay from their employers, the Royal Air Force; nor did those damages include any expenses of hospital treatment or medical attendance, because these benefits were provided for the men by the Royal Air Force.

This proceeding by way of information is now brought by the Attorney-General on behalf of His Majesty, claiming damages against the defendant in respect of the two matters to which I have referred—namely, the wages paid to the two aircraftsmen during the period of their incapacity, and the expenses of hospital and medical treatment provided for them while suffering by reason of the accident. The information, after setting out the facts of the accident, goes on to say: "Whereby His Majesty lost the services of the said J. D. Hull and the said N. W. Verney and all advantage which would otherwise have accrued to His Majesty from such services on and between the aforesaid respective dates and His Majesty was put to other expense in and about the premises," and thereupon makes a claim for the wages paid during the men's incapacity, and for hospital and medical expenses.

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(1) [1920] 2 K. B. 135.

As regards the claim in respect of wages, it is essentially a claim based upon the old common law principle that a master who has, by the tortious act of a third person, been deprived of the services of his servant may claim damages in respect of that deprivation against the third person who has brought it about. There is not, I think, any doubt that a right of action by a master for the loss of the services of his servant exists and has been recognized from early times. Curiously enough it has perhaps been kept in activity most frequently as the fictitious basis, and the only basis, for the action of seduction by which the seducer of a woman or girl may be made to pay the penalty of his wrong-doing. The Solicitor-General referred me to several cases based upon that principle, beginning with *Hall* v. *Hollander* (1) in 1825, and perhaps most noticeably exemplified in *Evans* v. *Walton*. (2) It is well settled that when by the tort of a third party a master has lost the services of his servant he can recover damages in respect of that loss of service. The amount of his damages is, of course, dependent upon the facts of the particular case. If he has got a substitute to do the work of the servant, his damages may be the extra cost to which he has been put over and above the payment he makes to the servant who is incapacitated. If he has put an end

(1) 4 B. & C. 660.

(2) L. R. 2 C. P. 615.

temporarily to the contract of service of the injured servant and pays him nothing, his damages would be the amount, if any, that he has to pay to the substitute. The payment, if any, that he makes to the substitute may of course be equal to, more than or less than the wage of the injured servant. On the other hand, where he does not employ a substitute, if he continues to pay the wages to the injured servant, he clearly loses any benefit arising from that payment, because he is getting nothing in return for it. In that case, therefore, his damages are, prima facie, the amount of the wages that he has thus paid for nothing. This case is of that last mentioned class, and the damages claimed on behalf of His Majesty are the amount of the wages paid to these men during their incapacity. There is no evidence to show that while these men were in fact being paid during their incapacity any extra men were recruited to take their place, or that any payment was made to any other person for doing their work. Therefore, prima facie, damage has been suffered to the extent of the wages thus paid to them for nothing. So much for the claim in respect of wages.

As regards medical expenses and hospital treatment, the claim for damages for these expenses is even more simple. It is put upon the ground that the Crown, having in fact expended the amount claimed under this head, ought to be compensated for these expenses by the person responsible for the negligence which rendered them necessary.

That being the claim which His Majesty would prima facie be entitled to make, the suggested answer is that it is simply a claim by a master for damages for loss of his servant's services and incidental expenses, and that it must be treated and decided on the common law principles applicable to that relationship. It is contended that His Majesty cannot claim either of these types of expenses, because the incurring of them was not essential or necessary and might have been avoided. It is said that the payment of wages to these men could have been avoided because they could have been dismissed from the service of the Crown as soon as they became incapable of doing their work. For the office or employment of any servant of the Crown is held solely at the pleasure of the Crown and can be determined at the will of the Crown at any moment. The Crown by not retaining these men in its service could have avoided any expenditure by reason of the payment of their wages. As regards the hospital and medical expenses, it is said that they were not incurred by reason of any obligation enforceable against the Royal Air Force or His Majesty, but were incurred purely voluntarily. For those reasons it is said that these two kinds of pecuniary outlay have not been necessarily incurred and therefore cannot be a ground of damage recoverable upon this cause of action.

It at once becomes apparent that if this reasoning is sound, and if the action thus suggested had been followed, namely, that these men should be dismissed or their pay suspended during the period of their incapacity, the immediate result would have been to increase the amount of damage which the men as individuals could have claimed against the defendant. As I have pointed out, if a man is incapacitated from doing any work owing to the negligent act of the driver of a vehicle, his most obvious claim for damages against the driver or his employer is for his loss of earnings by reason of the incapacity so created. No such claim has been made by either of these aircraftsmen as an individual against the defendant, because in fact he has not lost his wages but has been paid them. In answer to the contention of the defendant that His Majesty cannot recover from him the amount of the wages paid to the men while they were doing no work because these wages need not have been paid, it is enough to say that it is obvious that if the men had not received these wages the defendant would have been liable to them for exactly the same amount as an addition to their claim against him. The same reasoning applies and the same result follows as regards the hospital and medical expenses. If the officers of the Royal Air Force had refused, as I suppose they could, to take the man into hospital or had insisted on his paying for being taken there, a claim by the man as an individual would at once have arisen for the necessary expenses of providing himself with hospital accommodation and paying for it and would have been added to his claim against the defendant.

In those circumstances I think it is necessary to bear in mind that the defence in this case is in substance that the plaintiff cannot recover because he has unnecessarily and unreasonably incurred or inflated his damages. It makes the same point that was made in the case of *Admiralty Commissioners* v. *S.S. Amerika* (1), where Lord Parker said: "No person aggrieved by an injury is by common law entitled to increase his claim for damage by any voluntary act." (2) That proposition is of course perfectly sound. A person is entitled to recover only those damages which he has incurred while acting reasonably, and, if acting reasonably he could have minimized or reduced the damage that he has sustained to a smaller amount, it is only that smaller amount that he can recover. I think, however, that in considering that proposition in regard to such a case as this, one must, in estimating the standard of reasonableness, take into account all the circumstances affecting the defendant. It is quite true to say that if, by taking a reasonable course the officers of the Royal Air Force could have mitigated the amount of damages in respect of this matter they ought to have done so, but I do not think that it is sound to suggest that it would have been reasonable for them to take a course which would not have diminished by a penny the real and ultimate liability of the defendant, inasmuch as it would merely have transferred the claim against the defendant for the amount of these wages and hospital expenses from His Majesty to the men themselves. The truth is that by the negligence of the defendant's servant these men were incapacitated from working for a time. For the pecuniary loss caused by that incapacity the defendant is liable. If the loss fell upon the two men by reason of their not receiving their wages, they would be the claimants. If the loss falls upon the Crown because it has paid those wages, I think the Crown can claim damages for it, and that in all the

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(1) [1917] A. C. 38.

(2) Ibid. 42.

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circumstances the defendant is not entitled to say that the claim now put forward by the Crown is unreasonable. That appears to me to be a sufficient ground on which to decide this case in favour of the informant.

I ought, however, to say further that, as appears from the correspondence that passed before these proceedings began, reliance was chiefly placed by the defendant's advisers upon the case of *Admiralty Commissioners* v. *S.S. Amerika.* (1) It seems to me that that was a totally different case. It was an action by the Admiralty against the owners of a steamer which had sunk a submarine, and there was a claim to recover as part of the damages sustained the capitalized value of pensions payable by the Admiralty to the relatives of the men who were drowned in the submarine. Some sentences from the opinion of Lord Sumner have been cited on behalf of the defendant (2), and if regard be had merely to their terms they might be relied upon in support of his contention in this case. I think, however, that it is sufficient for the purpose of showing that these sentences ought not to be applied to such a case as the present, to bear in mind that in the opening of his speech Lord Sumner said: "It is clear that the action was not brought for the loss to a master of the services of his employee." (3) That observation was perfectly true. That action was not brought in respect of any loss of services of the employee, but in respect of a suggested liability to his dependents by reason of his death. In this case the action, and the whole essence of the action, is for the loss to a master of the services of his employee. These sums of money, unless it can be said that they were unreasonably, because unnecessarily and only voluntarily incurred, are clearly damages to the master in consequence, and only in consequence, of the loss of the services of the servant. The only question is whether it can be said by the defendant that they were not reasonably incurred by the master. Having regard to and taking into account all the circumstances for the purpose of judging the standard of reasonableness, I think that these damages were reasonably incurred, and, therefore, that they are properly recoverable.

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(1) [1917] A. C. 38.

(2) Ibid. 60, 61.

(3) Ibid. 50.

There being no question about the amount, the result is that there will be judgment for the Crown for the sum of 326*l*. 18*s*. 8*d*.

Judgment accordingly.

Solicitor for the informant: *The Treasury Solicitor.*
Solicitors for the defendant: *Hair & Co.*

J. R.

BELTON *v.* CROWLE DISTRICT DRAINAGE BOARD.

1935
April 30;
May 1, 2.

Land Drainage—Local Act—Powers of Drainage Boards—Protective Provisions—Continuance—Land Drainage Act, 1930 (20 & 21 *Geo.* 5, *c.* 44), *s.* 66.

The Land Drainage Act, 1930, s. 66, provides: "Where by any local Act powers are conferred on a drainage board or local authority similar to the powers conferred by this Act, and that local Act contains provisions for the protection of any authorities, companies, or persons, those provisions shall apply to the exercise by any drainage board within the area to which the local Act applies of the powers conferred on drainage boards by this Act in like manner as they apply in relation to the exercise of the powers under the local Act":—

Held, that the above section has no reference to provisions dealing with rating, and that therefore it did not apply to preserve a provision in a local Act of 1816, giving exemption from a rate levied to meet the expenses of land drainage.

Query, whether a "commissioner" or "surveyor" in the local Act is within the term "local authority" in the above section.

CASE stated by the Court of Quarter Sessions for the County of Lincoln.

These were appeals by the above-named appellants pursuant to the provisions of the Land Drainage Act, 1930, s. 30, against two rates made by the respondents on August 9, 1933—namely (*a*) an owner's drainage rate, wherein the appellants Lilly Belton and Thomas Fowler Belton were (inter alios) included as being the owners of certain hereditaments situate within the district of the respondents, and (*b*) an occupier's drainage rate wherein the appellant, Thomas Fowler Belton, was (inter alios) included as being the occupier of certain of the said hereditaments. The appeals were heard at the quarter sessions held on October 7, 1933. Upon counsel for the appellants stating that the material facts were not in dispute, that those facts were common to both appeals, and that the question of law arising thereupon was the same in both appeals, the court with the consent of counsel for the respondents heard both appeals together. The court after hearing counsel allowed the appeals with costs and quashed the said rates subject to the opinion of the King's Bench Division of the High Court of Justice on the following case:—

By the Doncaster District (Crowle District) Drainage Order, 1932, dated December 3, 1932, and made by the Minister of Agriculture and Fisheries, a certain area described in the said order and shown by colour on a map sealed by the Minister was constituted as a new drainage district for the purposes of the Land Drainage Act, 1930, under the name of the "Crowle District Drainage District." The Crowle District Drainage District so constituted included (inter alia) certain lands in the parish of Amcotts. The respondents are the Drainage Board for the said District. The appellants Lilly Belton and Thomas Fowler Belton are the owners and the appellant Thomas Fowler Belton is the occupier of certain hereditaments within that part of the parish of Amcotts which is within the said District. On August 9, 1933, and pursuant to the provisions of the Land Drainage Act, 1930, the respondents made two rates: (*a*) an owner's rate and (*b*) an occupier's rate. The expenses of the respondents for raising which the said rates were made were as to part thereof in respect of drainage works within the lands described as "the said low lands" in s. 25 of the Act of 1816 set out below. The appellants Lilly Belton and Thomas Fowler Belton and the appellant Thomas Fowler Belton were (inter alios) included in the said rates as being respectively the owners and the occupier of the above hereditaments.

The relevant sections of the statutes referred to are as follows :—

A. Of the Act of June 2, 1813 (53 Geo. 3, c. clxxvii.), intituled "An Act for enclosing lands in the townships of Crowle, Eastoft and Ealand in the parish of Crowle in the county of Lincoln, and extending into the West Riding of the county of York."

(i.) By s. 1 of the said Act (hereinafter referred to as "the Act of 1813") certain persons named therein were appointed Commissioners "for dividing allotting inclosing draining warping and embanking all the open arable fields meadows pastures Ings Carrs Moors Commons and Waste Lands within the . . . . several townships of Crowle, Eastoft and Ealand in the parish of Crowle: and also all such commons and moors within the . . . , West Riding of the . . . . county of York . . . . as are appurtenant to or belonging to estates within the . . . . parish of Crowle or the owners thereof" and for carrying the said Act and the Inclosure (Consolidation) Act, 1801, into execution.

(ii.) Sect. 18 empowered the Commissioners (hereinafter referred to as the "Commissioners of Inclosure") to scour out and widen all the ancient brooks, drains, watercourses, ditches, tunnels, sluices and bridges and to make, cut, erect, set out and appoint new drains, watercourses, ditches, tunnels, sluices, gates, banks and bridges, and required them to order and determine by an award "by whom and at whose expense, in what proportions, at what time and in what manner, the said brooks, ditches, drains, watercourses, tunnels, sluices, gates, banks and bridges shall be made and afterwards cleansed scoured repaired and maintained."

(iii.) Sect. 54 provided that "all charges and expenses which shall arise subsequent to the execution of 'the said award' respecting the future reparation and support of the sewers, banks, sluices, and other works to be made and ordered by the . . . . Commissioners in pursuance of the powers hereby vested in them, shall be borne and defrayed from thenceforth for ever thereafter . . . . in such shares and proportions as shall be thought just and equitable by the . . . . Commissioners and as shall be set forth in their . . . . award."

B. Of the Act of June 20, 1816 (56 Geo. 3, c. lviii.), intituled "an Act for amending an Act of His present Majesty intituled an Act for enclosing lands in the township of Crowle, Eastoft and Ealand in the parish of Crowle in the county of Lincoln and extending into the West Riding of the county of York; (Meaning thereby the Act of 1813)" and "for draining or warping the said lands and lands in the parishes of Luddington, Belton and Adlingfleet, and for making drains in the parish of Althorpe; all in the said counties of Lincoln and York."

(i.) The said Act contained the following recitals:—

(*a*) That the lands included in the Act of 1813 and other lands, as well as open as inclosed, in the parish of Crowle and in the parish of Luddington in the county of Lincoln and also certain lands in the township of Belton in the parish of Belton particularly described in the recital, and certain lands in the parish of Adlingfleet in the county of York also particularly described in the recital, were frequently overflowed with water and upwards of two thousand acres thereof were totally unfit for tillage; but that the said last mentioned lands might be rendered highly productive and all the said lands be greatly improved if properly drained embanked and warped; (*b*) that it might be necessary for the purposes of such drainage embankment warping and improvement that certain works particularly described should be carried out; and (*c*) that it was requisite that some of the provisions of the Act of 1813 should be amended and that the powers of the Commissioners appointed by virtue thereof should be enlarged.

(ii.) Sect. 1: "Be it enacted that Joseph Thackray of Gainsborough in the said county of Lincoln Gentleman shall be and he is hereby appointed Commissioner for executing the necessary works for effecting the drainage and warping of the said lands, and for otherwise carrying into execution the several powers of this Act relating thereto."

(iii.) Sect. 7 authorized and required the said Commissioner to execute certain works including (inter alia) the building of a new sluice in the bank of the River Trent in the township of Amcotts in the parish of Althorpe and the making of a new cut or drain from the said new sluice through the said township of Amcotts.

(iv.) Sect. 21: "And be it further enacted, that it shall be lawful for the Commissioners of Inclosure appointed by or by virtue of the said recited Act" (being the Commissioners and Act referred to in para. 7 A (i.) of this case) "or any two of them and they are hereby required within three calendar months, or as soon as conveniently may be after the passing of this Act, to ascertain and determine what part or parts of the lands included in the said recited Act and the lands in the said parish of Luddington, are capable of being drained, warped and improved, and shall then ascertain and determine the respective proportions of the whole general expenses of draining and warping respectively, which such several lands and grounds, and also the lands and grounds in the parish of Belton hereinbefore particularly mentioned to be drained warped and improved, and also the lands and grounds in the parish of Adlingfleet hereinbefore particularly mentioned to be drained and improved by virtue of this Act, or the person or persons who is, are, or shall be the proprietor or owner or proprietors or owners of such several respective lands and grounds ought to be charged with or to bear, and shall declare the same at a meeting or meetings to be called for that purpose, by notice to be given in manner directed by the said recited Act respecting the first meeting of the Commissioners, as therein mentioned; and when the said Commissioners of Inclosure shall have ascertained and determined such several and respective proportions, a memorandum or specification of the particulars thereof shall be written or engrossed on parchment, in two parts, and signed and sealed by such Commissioners of Inclosure, one part whereof shall be enrolled and lodged with the award of the said Commissioners of Inclosure, as mentioned in the said recited Act, and the other part shall be by them delivered to the Commissioner for executing this Act, and the several and respective proportions particularized in such specification shall be at all times observed by the said Commissioner for executing this Act, and by all and every the surveyor or surveyors to be appointed under or by virtue of the powers and provisions of this Act as the scale or rule of proportion by which the assessments to be made or laid by virtue of this Act shall be assessed paid and levied; and all the costs charges and expenses of obtaining and passing this Act, and attending the making and completing the said several sluices drains cuts and other works and of otherwise carrying this Act into execution shall be borne and paid by the person or persons who is, are or shall be the proprietor or owner, or owners or proprietors of the lands and grounds so to be declared capable of being drained or warped or improved."

(v.) Sect. 24, so far as is material, is as follows: "and be it further enacted, that it shall be lawful for the Commissioner for executing this Act, and he is hereby authorised and empowered from time to time until the said intended works for drainage and warping shall be completed, to assess, tax and charge such of the lands in the said several parishes as shall be so declared by the said Commissioners of Inclosure to be capable of being improved as aforesaid, or the owners or proprietors of such lands, and according to the scale of proportion aforesaid, with such sums of money as he the said Commissioner for executing this Act shall from time to time find necessary and requisite for defraying the costs charges and expenses of obtaining this Act, and of carrying the same into execution, (not exceeding in the first year after the passing of this Act the sum of five pounds per acre and not exceeding in the second year after the passing of this Act the sum of three pounds per acre, and not exceeding in the whole the sum of ten pounds per acre) . . . . and the balance, if any, upon the final settlement of accounts shall be immediately repaid to the land owners in proportion to the sums respectively paid by them."

(vi.) Sect. 25: "Provided always, and be it further enacted, that none of the homesteads, old inclosed and field lands not benefitted by the drainage, nor any of the lands lying on the south side of the Stainforth and Keadby Canal, nor shall any lands and grounds in the said township of Amcotts, or the proprietors or proprietor thereof, be liable or subject to taxation for the expenses of draining the said low lands under the authority of this Act, nor for any of the expenses of obtaining and executing the same."

(vii.) Sect. 26: "Provided always, and be it further enacted, that the surveys and plans made in pursuance of the said recited Act, shall be used by the said Commissioner for the purposes of this Act, without fee, reward, or any recompense whatsoever."

(viii.) Sect. 31: "And be it further enacted, that the monies arising from the taxes to be raised by virtue of this Act shall be paid and applied by the said Commissioner in the first place in defraying the charges and expenses of obtaining and passing this Act, and of making the necessary surveys, plans, valuations and reports incident or preparatory thereto, and in making, executing and completing the several works of drainage by this Act directed and authorised to be made done and executed and all necessary charges and expenses to be incurred in or relating to the due execution of this Act."

(ix.) Sect. 34, so far as is material, is as follows: "And be it further enacted that as soon as the said sluices and cuts or drains and other works hereinbefore authorised to be made or done, shall be made or executed and completed, the Commissioner for executing this Act shall and he is hereby empowered and required to form or draw up and make an award, which shall be fairly written or engrossed on parchment, and signed and sealed by the said Commissioner, who shall therein specify and declare according to the scale or rule of proportion hereinbefore mentioned, what lands will be benefitted by or under the provisions of this Act, and at whose costs and in what proportion and in what manner the several works by this Act directed or authorised to be made shall from thenceforth be kept in repair and at what time or times and how, and in what manner the said drainage and warping shall be done, together with such other regulations and particulars as he shall think requisite for carrying the purposes of this Act into complete execution. . . . ."

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(x.) Sect. 35, so far as is material, is as follows: "And be it further enacted, that as soon as the said banks, drains, sluices, tunnels, and other works hereby directed or authorised to be made shall be made and perfected, and the said Commissioner shall have ascertained the proportion of the expenses to be paid by each proprietor as aforesaid, and shall have executed his award, the said banks and other works, and the said warping, shall from time to time be under the care and inspection of, and, as often as necessary, shall be repaired and amended and kept in good repair and condition and the warping carried on by a person to be appointed surveyor thereof by a majority in value (to be ascertained by the land tax assessment) of the several proprietors for the time being of the lands and grounds which shall be deemed capable of receiving improvement by warping as hereinbefore mentioned, or hereby directed to be embanked, drained and warped, or their stewards, who shall be present at a meeting to be held in the said parish of Crowle on the first Monday in March in every year, or oftener if required, as hereinafter is mentioned. . . . ."

(xi.) Sect. 37. And it be further enacted that for the better enabling the said Surveyor for the time being to raise money for the purpose of carrying into execution the powers hereby reposed in him, it shall and may be lawful to and for the surveyor for the time being, when and so often as occasion shall require, to make an Acre Rate or assessment according to the scale or Proportion laid down in the Commissioner's Award, upon all and every the Proprietors of the said lands, to be embanked, drained and warped by virtue of this Act; all which rates or assessments having been allowed and signed by a majority in value (to be ascertained as aforesaid) of the persons interested in such lands respectively, or their Stewards for that purpose specially appointed who may be present at a Meeting to be called in the same manner as hereinbefore mentioned with respect to the choice of a new Surveyor for the purpose of getting such rates or assessments considered and allowed, shall be collected and received by the said Surveyor for the time being; and in case any of the

Proprietors for the time being shall refuse or neglect to pay such rates or assessments immediately after the same shall be so made signed and allowed (being first lawfully demanded of such Proprietors respectively) then it shall and may be lawful to and for any Justice of the Peace acting in and for the parts of Lindsey in the said county of Lincoln, to make enquiry of such default, by summoning to appear before such Justice such Proprietor of whom such rates or assessments shall have been demanded (and for this purpose Notice in Writing left at the usual residence of the person intended to be summoned, or of his Lessee or Tenant, shall be a good Summons); and if such defaulter thereof shall be convicted, either by his own confession, or upon the Oath of the Surveyor for the time being, or any other competent or credible witness (which Oath the said Justice is hereby empowered to administer) or shall not appear pursuant to such summons, the said Justice shall and he is hereby required to levy the said rates or assessments by distress and sale of the goods and chattels of such Proprietors, wheresoever the same shall be found, together with the reasonable costs and charges attending such summons distress and sale, to be settled and allowed by the said Justice, rendering the overplus (if any) on demand to the Owner of such goods and chattels.

(xii.) Sect. 38: Provided always, and be it further enacted that in case any part of the said lands to be embanked, drained, warped, as aforesaid shall at any time hereafter be untenanted or unoccupied and no sufficient distress can be made for levying the said rates and taxes, then the lands chargeable therewith shall always remain a security for payment thereof and all goods and chattels which shall at any time thereafter be found thereon shall and may be distrained, impounded and kept and sold in manner aforesaid, until all arrears of the said rates and taxes, and the charges incident to such distress, shall be fully paid and satisfied.

C. Of the Land Drainage Act, 1930.

Sect. 66. "Where by any local Act powers are conferred on a drainage board or local authority similar to the powers conferred by this Act, and that local Act contains provisions for the protection of any authorities, companies, or persons, those provisions shall apply to the exercise by any drainage board within the area to which the local Act applies of the powers conferred on drainage boards by this Act in like manner as they apply in relation to the exercise of the powers under the local Act."

It was contended on behalf of the appellants (*a*) that s. 25 of the Act of 1816 was within the meaning of the Land Drainage Act, 1930, s. 66, a provision for the protection of (inter alios) proprietors of land in the Township of Amcotts; (*b*) that the effect of the Land Drainage Act, 1930, s. 66, was to require the respondents in making a rate under s. 24 of the said Act to observe the provisions of s. 25 of the Act of 1816; and (*c*) that, inasmuch as the expenses for raising which the rates the subject of the appeals were made were as to part thereof in respect of drainage works within "the Low Lands" within the meaning of the Act of 1816, s. 25, the said rates so far as they purported to include the appellants were bad in law and ought to be quashed.

The respondents contended to the contrary of each of the propositions of the appellants. The respondents cited the decision of a Divisional Court given on July 19 in *Gas Light and Coke Co.* v. *Canvey Island Commissioners.* (1)

The Court of Quarter Sessions upheld the appellants' contentions and allowed the appeals with costs and ordered that the said rates be quashed, subject to this case. The question for the opinion of this Honourable Court is whether upon the facts stated the Court of Quarter Sessions was right in so deciding. If the Court shall be of opinion in the affirmative then the orders of Sessions are to stand confirmed. If the Court shall be of opinion in the negative then the said orders of Sessions are to be quashed and the Court is respectfully requested to make such orders as ought to have been made by the Court of Quarter Sessions.

The arguments of counsel are sufficiently set out in the judgments of the Court.

(1) Unreported.

W. E. Tyldesley Jones K.C. and *Hubert Hull* for the Crowle District Drainage Board (the present appellants).

R. M. Montgomery K.C., *P. E. Sandlands K.C.*, and *Geoffrey Howard* for the three owners and occupiers (the present respondents).

LORD HEWART C.J. This is a case stated by the Court of Quarter Sessions for the County of Lincoln. It arises out of appeals by the appellants under the Land Drainage Act, 1930, s. 30, against certain rates made by the respondents, the Crowle District Drainage Board, on August 9, 1933. Those rates were, first, an owner's drainage rate, wherein some of the appellants were included as owners of certain hereditaments within the district of the respondent Board, and secondly, an occupier's drainage rate, wherein one of the appellants was included as being the occupier of certain of the hereditaments. The appeals were heard in October of 1933, and the material facts were not in dispute. A question of law was argued, and the Court of Quarter Sessions, after hearing the arguments, allowed the appeals with costs, and quashed the rates so far as the appellants were concerned, subject to the opinion of this Court upon the case stated. The question is whether the Court of Quarter Sessions was right in law in holding that the appellants before that Court were entitled to succeed.

The history of the matter may be quite shortly stated. Under the Doncaster District Drainage Act, 1929, and an Order made thereunder the Crowle District Drainage Board was legally constituted, and is to-day, and was at all material times, what is called an internal drainage board within the meaning of the Land Drainage Act, 1930. Before the passing of that Act it seems to be true to say that in general the method or principle upon which land drainage proceeded was a method of equality of burden and benefit—acreage as distinguished from annual value. But one of the main objects of the Land Drainage Act, 1930, as has been made clear over and over again, was to obtain uniformity, subject to certain exceptions, in basing the drainage rate upon the annual value of the hereditaments, without a very careful regard to the precise degree of benefit derived in any particular case from the drainage works which were carried out.

In the particular part of the country with which we are here concerned, namely, a part of what was the Parish of Althorpe and the part of that Parish called Amcotts, in 1816, an Act of Parliament was enacted which is called the Crowle, Ealand, Eastoft, Belton, and Luddington Drainage Commission Act. The long title of that Act is in the following terms: "An Act for amending an Act of His present Majesty"—that is to say, George III.—"intituled An Act for enclosing lands in the Townships of Crowle, Eastoft, and Ealand, in the Parish of Crowle, in the County of Lincoln, and extending into the West Riding of the County of York, and for draining or warping the said lands, and lands in the Parishes of Luddington, Belton, and Adlingfleet, and for making drains in the Parish of Althorpe; all in the said Counties of Lincoln and York." It is apparent, therefore, at the outset, that the title of this local Act suggests a distinction between the Parishes of Luddington, Belton, and Adlingfleet, on the one hand, and on the other hand, the Parish of Althorpe. In the case of the first-named Parishes the Act was to apply for the purposes of draining or warping the said lands, while with regard to the Parish of Althorpe it was an Act for making the drains in that Parish, and, as the provisions of the Act and the undisputed facts of this case show, so far as Amcotts was concerned, it was a piece of land through which a pipe line was driven for the purpose not of draining the superficies of the land itself, but for the purpose of carrying the matter that had to be drained from one piece of land to another, both those pieces of land being other than Amcotts.

The main weapon of the appellants in the Court below was s. 25 of that local Act, read, as they contended it should be read, side by side with the Land Drainage Act, 1930, s. 66. The local Act, up to and including s. 24, had described certain works which should be done in different places, drawing from time to time, as in particular ss. 6, 7, 12 and 21 make plain, a distinction between the first three named Parishes, of

Luddington, Belton and Adlingfleet, on the one side, and the last of the four, the Parish of Althorpe, on the other side. Then s. 24 describes in particular certain works of drainage which are to be carried out, and empowers the Commissioner (who was afterwards succeeded by a person called a Surveyor) to assess tax and charge certain lands, according to the proportions set out, with the sums of money found necessary and requisite for defraying the costs of obtaining the Act, carrying it into execution, and further sums to be charged and assessed at certain times and places. But on the threshold of that important section one finds the words "from time to time until the said intended works for drainage and warping shall be completed," and it is common ground that that time has long since passed.

The next section (s. 25) is a proviso limited in its scope to s. 24, and it is as follows: "Provided always, and be it further enacted, that none of the homesteads, old inclosed and field lands not benefitted by the drainage, nor any of the lands lying on the South side of the Stainforth and Keadby Canal, nor shall any lands and grounds in the said township of Amcotts, or the Proprietors or Proprietor thereof, be liable or subject to taxation for the expenses of draining the said low lands, under the authority of this Act, nor for any of the expenses of obtaining and executing the same." The main argument in the court below on the part of the appellants was that they came within the class of persons exempted by s. 25 of the Act of 1816. It was said that the rate against which the appeal was made was in part, at any rate, and for the most part, a rate levied in order to meet the expenses of draining the said low lands under the authority of the Act of 1816. Placing that section side by side with s. 66 of the Land Drainage Act, 1930, the appellants contended, and contended with success, that the exemption referred to in the Act of 1816 was not only continued but also extended by the provisions of the later legislation. Sect. 66 is as follows: "Where by any local Act powers are conferred on a drainage board or local authority similar to the powers conferred by this Act, and that local Act contains provisions for the protection of any authorities, companies, or persons, those provisions shall apply to the exercise by any drainage board within the area to which the local Act applies of the powers conferred on drainage boards by this Act in like manner as they apply in relation to the exercise of the powers under the local Act."

It was urged on behalf of the appellants that the moneys to be obtained by means of the rate appealed against fell within the Act of 1816, s. 25, and therefore that by reason of the provisions of the Land Drainage Act, 1930, s. 66, the exemption which they said they enjoyed continued; or, to put it quite simply, that they did not come within the mischief of rateability by reference to annual value, but were still entitled to say: "As we have no benefit, so we must have no burden." That contention was successful before the Court of Quarter Sessions.

The main question here is whether the effect of the Land Drainage Act, 1930, s. 66, was that which was contended for by the appellants. Sect. 66 begins: "Where by any local Act powers are conferred on a drainage board or local authority similar to the powers conferred by this Act, and that local Act contains provisions for the protection of any authorities, companies, or persons." What is a drainage board within the meaning of that section? What is a local authority? What are powers similar to the powers conferred by the Act of 1930? And what is meant by "protection of authorities, companies, or persons"?

I will deal briefly with those questions in the inverse order. It has been contended before us that this word "protection" means—not only in the abstract, which is one thing, but in this context in this statute, which is another thing—exemption from rating. It is said that if "protection" in this sentence does not mean exemption from rating, then the category is void, and there is nothing to which it can apply. This second criticism seems to be manifestly wrong when one looks at the local Act of 1816, ss. 50 and 51, which refer respectively to protecting participants against the effects of the works of drainage and protecting a particular canal with its side drains from being affected or injured by the physical work which was to be and was carried out. But is it true to say that, in this Act and in this section of this Act, "protection" does include exemption from rating? If it did, it would be an odd word to employ for the purpose. It is not denied that there may be contexts in which the term "protection" is wide enough and precise enough to include exemption from rating. But it is said that it would be contrary to the whole scheme and to the particular provisions of this Act if in s. 66 "protection" were to have that significance, and in particular, when one looks at the Land Drainage Act, 1930, s. 24, one finds certain limited and precisely defined powers which, if the wide meaning given to the term "protection" were right, would be mere surplusage, and misleading surplusage. Sect. 24 is dealing with rating powers of the drainage boards other than catchment boards, and by sub-s. 2 it is provided that a rate made by a drainage board may be either an owner's drainage rate or an occupier's drainage rate, and then follows this proviso: "Provided that as regards any rates raised in order to defray expenses incurred, or charges in respect of liabilities incurred, before the commencement of this Act, the provisions as to the incidence of rates contained in section thirty-eight of the Land Drainage Act, 1861, or, in the case of rates raised under any local Act, the corresponding provisions in that Act, shall have effect in substitution for the provisions of this subsection." The limiting words are manifest: "before the commencement of this Act." What need, it is asked, would there be for making a particular provision of that kind with reference to the period before the commencement of this Act, if it were true to say that the whole of such expenses and liabilities were saved under the provisions of the local Act? It is as if one were to say that to make quite sure that the whole includes the part, there shall be not only an enactment with regard to the whole, but a particular enactment with regard to the part. In like manner, when one looks at sub-s. 4 of s. 24, it is provided that: "Every rate made by a drainage board shall be an annual value rate, that is to say, a rate assessed on the basis of annual value as regards all hereditaments, and, subject to the provisions of this section, every drainage rate shall be assessed at a uniform amount per pound throughout the area—(*a*) in the case of agricultural land, on the annual value of the land; and (*b*) in the case of any other land, on one-third of the annual value thereof." Then follows another significant proviso: "Provided that, where at the commencement of this Act a drainage board was levying drainage rates on the basis of acreage, or partly on the basis of acreage and partly on the basis of annual value, any rate made by that board at any time within the period of six months next following the commencement of this Act may be made on any basis on which it might have been made if this section had not been passed." Again one finds, not indeed the same, but similar limiting words, "at any time within the period of six months next following the commencement of this Act," and if the universal proposition were true that there is a saving always in all such cases, the limitation "within the period of six months" would be not only useless but misleading. Finally it is provided by s. 24, sub-s. 7, as follows: "A drainage board, after consultation in the case of an internal drainage board with the Catchment Board, may by order determine that no rates shall be levied by them on the occupiers of hereditaments in any portion of the district which, in their opinion, either by reason of its height above sea level or for any other reason, ought to be exempted wholly from rating." There again it is argued by Mr. Tyldesley Jones that there is a particular and limited provision that in a case which seems proper the drainage board may by a special and individual Order determine that no rate shall be levied except in a certain way, if at all, and it is said that such a provision would be otiose if it were indeed true that by s. 66 of the Act of 1930 protection is continued and, indeed, extended, to all persons falling within the ambit of a local Act like the Act of 1816. In my opinion, the arguments of Mr. Tyldesley Jones upon these matters are quite conclusive, and I am satisfied that whatever may be the true scope of s. 66 of the Land

Drainage Act, 1930, it has nothing at all to say from first to last to the question of rating. But even if it were otherwise, and if, in truth and in fact, the Act of 1930, s. 66, did comprehend the topic of rating, nevertheless, I think the argument for the present appellants (the respondents in the Court below) would be entitled to succeed. "Where by any local Act," says s. 66, "powers are conferred on a drainage board or local authority." Here the powers conferred by the Act of 1816 were conferred, in the first place, upon a commissioner for the purpose of carrying out the works, and later, upon a surveyor for the purpose of maintaining the works. But could it be said, even for controversial purposes, that either of those individuals—commissioner or surveyor—was a drainage board? In 1930, when this statute was enacted, the term "drainage board" was quite familiar. I cannot entertain the argument that for this purpose either a surveyor or a commissioner could be called a drainage board. But was he a local authority? By a stretch of reasoning it might perhaps be said that he was a local authority exercising some sort of jurisdiction in the locality. There again, for my own part, I am disposed to think that that term "local authority" by the year 1930, and especially in juxtaposition with such a term as "drainage board," was not intended to refer to a commissioner or surveyor. But here again, even if the arguments made on behalf of the present appellants (the respondents below) had not so far succeeded, the Act goes on to say that what is provided shall take place where powers are conferred on a drainage board or local authority similar to the powers conferred by the Land Drainage Act, 1930. But here it seems to me the attempt to apply s. 66 to the present case must fail. There is in my opinion not merely some difference, but all the difference, between an enactment which gives the most general power with regard to drainage, as is done in the Land Drainage Act, 1930, and the very limited power, so far as Amcotts is concerned, given by the Act of 1816—namely, that a pipe line should be driven through it, not in order to drain Amcotts, but in order to carry the material that had to be drained for some land above it to some other land below it. I cannot regard those as similar powers, unless, indeed, it is to be said that every power which has to do with rating is similar to every other power which has to do with rating; and if that were the intention, these words "similar to," contained in s. 66, would seem to me to be mere surplusage again.

There remains the point, on which Mr. Tyldesley Jones placed no great stress, that this area is not an area to which the local Act applies. The word "applies" is difficult. That the local Act had some application to the area is manifest, and the area is from time to time mentioned eo nomine in the statute. But for what purpose is it mentioned?—not as part of the area to be drained, but finally, the fourth limb of the series, as a parish, part of Althorpe, where a drain is to be made—not to drain Amcotts, but to drain other land. I do not think that it is true to say that within the meaning of s. 66 this particular area is an area to which the local Act is applicable in the sense required by the Act of 1930, s. 66. But that point is not necessary to the decision of this case. I am satisfied that upon other grounds, and especially upon the ground that the Land Drainage Act, 1930, s. 66, is not concerned with rating, the appellants before us ought to succeed, and the decision of the Court of Quarter Sessions ought to be reversed. This is by no means a simple matter, and it is apparent from the judgment of the learned Chairman of Quarter Sessions in the Court below that great care was expended upon a difficult case.

AVORY J. I agree that this appeal from the decision of the Court of Quarter Sessions should be allowed. Mr. Montgomery, in support of the judgment of the Court of Quarter Sessions, has relied upon two grounds: first, upon the general principle that a general Act is not to be taken impliedly to repeal any provision of exemption contained in a special or local Act unless the context clearly shows that to have been the intention of the Legislature; and secondly, he relies upon the Land Drainage Act, 1930, s. 66.

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With regard to the first point, I think the contention fails, for these reasons. In order to determine whether a general Act does impliedly repeal the provisions of a special Act, it is necessary, first of all, to see the nature of the exemption conferred by the special or local Act, and it is then further necessary to consider whether the terms of the general Act are such as to show that there was an intention on the part of the Legislature to override or supersede the particular provisions of the special Act. Here the exemption which is relied upon is, as has been pointed out by my Lord, contained in the local Act of 1816, s. 25, and it is to be observed that it is not in terms an exemption from all taxation of any kind for the expenses of draining low lands, but it is limited to an exemption from taxation for "the expenses of draining the said low lands under the authority of this Act," and the exemption being limited in that way, the question arises whether it can be intended to be an exemption from the expenses of draining the low lands under the authority of some other Act. In my opinion, those words ought to be strictly construed and applied to that particular exemption —namely, that it is only the expenses of draining the low lands under the authority of the Act of 1816 with regard to which there is any exemption.

Turning now to the general Act, it is important to observe, first of all, that it is entitled "An Act to amend and consolidate the enactments relating to the drainage of land"—that is all land; and Part I., s. 1, provides that: "For the purpose of the drainage of land" (again apparently meaning all land) "there shall be such drainage districts as are mentioned in this section and there shall be a drainage board for each such drainage district." By sub-s. 3: "Subject to the provisions of this Act, a drainage board shall exercise a general supervision over all matters relating to the drainage of land within its district and shall have such other powers and perform such other duties as are conferred or imposed on drainage boards by this Act." Then we come to the provisions of s. 24, which I need not repeat; my Lord has referred to the material provisions in s. 24,

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which appears to me to be a complete code providing for the manner in which the expenses of the drainage board are to be met—namely, by a rate made by the drainage board; and there are, as has been pointed out, distinct provisions in s. 24 giving a wide discretion to the drainage board either to divide their district into sub-districts and to make and levy differential rates for these sub-districts and to determine the amount per pound to be assessed upon the occupiers of hereditaments in any sub-district, and finally, as has been pointed out, in sub-s. 7 a power conferred upon the drainage board actually to determine that no rates shall be paid or levied by them on the occupiers of particular hereditaments which in their view ought to be exempted wholly from rating. Therefore, I come to the conclusion, looking at the restricted terms of the exemption, and upon the general provisions in the Act of 1930, that it is impossible to say on that general principle of law that the general Act has not overridden or superseded s. 25 of the Act of 1816.

So much for the argument upon the general principle as to the construction of statutes. Turning now to s. 66 of the Act of 1930, I am not prepared to assent to Mr. Tyldesley Jones' contention that the word "powers" in s. 66 does not relate to a power to make a rate under s. 24—quite apart from the marginal note which describes that section as relating to rating powers of drainage boards; nor am I prepared to say that the commissioner or surveyor—surveyor is the real question—under the Act of 1816 is not, within the meaning of s. 66, a local authority. I express no concluded opinion upon that. In view of the fact that he does exercise authority locally, although the expression "local authority" had a recognized meaning in 1930, I am not prepared to decide the case on the ground that the surveyor was not a local authority. But I am clearly of opinion that the local Act does not, within the meaning of s. 66, contain provisions for the protection of persons in the sense of protecting them from the payment of rates. I think this provision refers to the kind of protection which is contemplated in ss. 50 and 51, and, it may be, elsewhere in the Act of 1816; in other words, that it refers to the protection of the interests of property owners or persons whose property may be in any way damaged by the execution of the works, and that, to use the phrase adopted by Mr. Tyldesley Jones, the section generally has no reference at all to the question of rating.

For these reasons, I agree that neither on the general principle as to the construction of statutes, nor by the express provisions of s. 66, were these appellants, who were respondents in the Court of Quarter Sessions, exempted from the payment of the rate in question; and for that reason, that the judgment of the Court of Quarter Sessions was erroneous and ought to be reversed.

HUMPHREYS J. I agree that this appeal should be allowed. Mr. Montgomery's first point has been dealt with by Avory J. in his judgment and I agree with every word of that judgment. If Mr. Montgomery is wrong on his first point he must bring himself within the Land Drainage Act, 1930, s. 66. The opening words of s. 66 are: "Where by any local Act powers are conferred on a drainage board or local authority similar to the powers conferred by this Act." I agree with the judgment of Avory J. as to the meaning of the word "powers" in that section. I observe that the "powers" referred to must be conferred on a drainage board or local authority. It is clear that neither the commissioner nor the surveyor referred to in this local Act of 1816 ever was a drainage board, and although I share the doubt expressed by Avory J. whether he might not possibly be described as a local authority, I cannot think that Parliament in 1930 intended to include in that term any such persons as either the commissioner or surveyor described in the Act of 1816.

The Land Drainage Act, 1930, s. 66, then goes on to say that where a local Act "contains provisions for the protection of any authorities, companies, or persons." . . . . [His Lordship then held that persons living in the parish referred to in the local Act and known as Althorpe, which was the parish concerned in the present case, were never liable, under the Act of 1816, to pay for or to contribute to payment for the construction of the works authorized by that Act, and therefore it could not be said that there was any exemption in the local Act or provision for their protection. He continued:] The other point raised by Mr. Tyldesley Jones is a difficult one, and with some hesitation I agree with his argument. I think that s. 66 has nothing to do with rating. It is concerned with maintaining, in favour of "any authorities, companies, or persons," provisions contained in any local Act for their protection. Many instances of such provisions can be found and, that being so, the word "protection" is the natural word to be used, which could not be the case if it were used in this statute in regard to exemption from rating. I agree with Mr. Montgomery that "protection" is a word which in an appropriate Act of Parliament might include exemption from rating, but in s. 66 one would have to strain the meaning of the word to a considerable extent to make it include exemption from rating. For these reasons and for those expressed in the judgments already delivered I agree that this appeal should be allowed.

Appeal allowed.

Solicitors for the appellants: *Andrew, Purves, Sutton & Creery, for Newman & Bond, Doncaster.*

Solicitors for respondents: *Williamson, Hill & Co., for Bentley, Gundill & Co., Goole.*

F. P. F.

MOUNTFORD *v.* LONDON COUNTY COUNCIL.

1935
May 27, 28.

Local Government—Poor Law—Transfer of Officers to County or County Borough—Tenure of transferred Officer—Right of County Council to dismiss and vary Terms of Employment—Local Government Act, 1929 (19 *Geo.* 5, *c.* 17), *s.* 121, *sub-s.* 1.

The effect of s. 121, sub-s. 1, of the Local Government Act, 1929, is that an officer of a poor law authority who has been transferred to the appropriate county council or county borough council under s. 119 of the Act retains all the incidents of his service and there is no change in the terms of his employment. If, therefore, the poor law authority was entitled to terminate his service by giving him proper notice and to re-engage him on different terms, the council are also entitled to do so.

Rowsell v. *Metropolitan Water Board* (1915) 84 L. J. (K. B.) 1869 followed.

Action tried by Porter J. without a jury.

The plaintiff, Frederick William Mountford, was, immediately before April 1, 1930, the "appointed day" under the Local Government Act, 1929, employed by the Lewisham Board of Guardians as superintendent gardener at Lewisham Hospital at a salary or remuneration of 4*l.* a week, with emoluments valued at 91*l.* 10*s.* a year. On April 1, 1930, the plaintiff, in accordance with s. 119 of the Act, ceased to be employed by the Lewisham Board of Guardians and became an officer of the defendants, the London County Council. He continued to perform under the defendants similar duties to those which he had performed under the Lewisham Board of Guardians.

By a letter dated March 7, 1933, the defendants gave notice to the plaintiff to terminate his employment with them on March 25, but stated that if, as from March 26, 1933, he would accept a reduced salary or remuneration of 3*l.* a week, with existing emoluments valued at 91*l.* 10*s.* a year, the notice of the termination of his employment would be deemed to have been withdrawn.

The plaintiff accepted the position without prejudice to his rights under the Local Government Act, 1929, but he brought this action in which he contended that the action of the defendants in giving him the notice contained in the letter was in contravention of the terms of s. 121, sub-s. 1, of the Act. (1) He claimed a declaration that he was entitled to receive, while performing his duties as superintendent gardener, a salary or remuneration of 4*l.* a week in addition to certain emoluments valued at 91*l.* 10*s.* a year, but that claim was amended at the trial to one for a declaration that he was entitled to receive a salary or remuneration not less than he would have been legally receiving if the Local Government Act, 1929, had not been passed and he had remained in the employment of the Lewisham Guardians in performance of similar duties. The plaintiff also claimed an account of the amount due to him.

The defendants, by their defence, stated that the plaintiff had made a claim on them for compensation under s. 123 of the Local Government Act, 1929, and that, on that claim being refused, he had given notice of appeal against the refusal to the Minister of Health under para. 13 of Sch. VIII. to the Act, which appeal was still pending. They, accordingly, contended that the Court had no jurisdiction to entertain this action, the plaintiff's remedy, if any, for their acts being to prosecute his appeal to the Minister of Health.

Montgomery K.C. and *Alun Pugh* for the plaintiff.
Trustram Eve K.C. and *H. B. Williams* for the defendants.

PORTER J. [having expressed the view on the evidence that, if the plaintiff had remained in the employment of the Lewisham Guardians, his wages would have continued to be 4*l.* a week with emoluments valued at 91*l.* 10*s.* a year :] I am asked by the plaintiff to say that, on the true construction of the Local Government Act, 1929, s. 121 applies to the

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(1) By Local Government Act, 1929, s. 121, sub-s. 1 : "Every transferred officer shall hold office by the same tenure and on the same conditions as immediately before the appointed day, and while performing similar duties shall, in respect thereof, receive not less salary or remuneration than the salary or remuneration to which he would have been entitled if this Act had not been passed."

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present case and that the plaintiff's right to compensation is to be determined by the Court. That question gives rise to two considerations—First, what jurisdiction has this Court? Secondly, if it has jurisdiction, is the plaintiff entitled to obtain compensation?

With regard to jurisdiction it is said that s. 123 of the Act applies only to cases where, by virtue of the Act of 1929 or anything done in pursuance or in consequence of it, the applicant suffers any direct pecuniary loss by determination of his appointment, or by diminution or loss of fees, salary or emoluments, and it is said that the plaintiff has not lost anything by virtue of the Act or anything done in pursuance or in consequence thereof. That is the argument advanced on behalf of the plaintiff, but it is accepted by the defendants, who say that the question is not what rights the plaintiff has under s. 123—that being a matter for determination if and when an appeal to the Minister of Health is heard—and take their stand on s. 121, contending that that section does not, on its true construction, give any right to the plaintiff to get damages or compensation from this Court. That, therefore, is the question which I have to determine.

The plaintiff says, in effect, that he is entitled to receive as compensation the difference between the salary which he is likely to receive from the defendants and the salary which it is likely he would have received had the Lewisham Board of Guardians remained in existence. I have come to the conclusion that the plaintiff has no right to compensation or damages under s. 121. Two cases have been quoted by which it is said that I am bound. The first of those two cases is *Rex* v. *London County Council. Ex parte Scriven.* (1) That was a decision of a Divisional Court consisting of Lord Alverstone C.J., Darling and Phillimore JJ. Lord Alverstone C.J., in the first part of his judgment, said that the dismissal of the applicant for the rule was not in pursuance or in consequence of the Act which in that case was applicable—namely, the Education Act, 1902, whence the result would follow that compensation would not be recoverable under the section in the Act of 1902 which corresponded with s. 123 of the Act of 1929. Lord Alverstone went on to leave open the question of an appeal to the Treasury as I am leaving open the question of an appeal to the Minister of Health. I find great difficulty in seeing that the principle applicable in that case is applicable in this, and I do not feel myself bound by it. But the second case quoted was *Rowsell* v. *Metropolitan Water Board* (1), which does seem to me to be a direct decision against the claim of the plaintiff in the present case. Mr. Montgomery has questioned the meaning and extent of the judgment of Lord Reading, but the statements contained in that judgment appear to me to show that Lord Reading had in mind the kind of argument which has been adduced before me to-day. To my mind he stated in plain terms his view that the body to whom an employee's services were transferred was entitled to dismiss the employee and to vary the terms of his service after he had become their servant and ceased to be the servant of the body from whom he was transferred. The language which I have in mind is this (2): "If, therefore, on June 24, 1904, the plaintiff was taken over by the operation of this Act, and had continued performing the duties of chargeman of the waste inspection gang—as he undoubtedly did—he would be entitled to receive the same rate of pay as he had received from the old company until the new Board, in pursuance of the original terms of the man's service, gave him a proper and a legal notice determining that service." A little above that he indicates the same view in these words: "I think that what Parliament intended by these words was that, so long as the servants were performing the same duties, the fact that they were taken over by the Water Board would, by itself alone, entitle them to the same conditions of service and rates of pay which they had hitherto enjoyed." The taking over left them in the same position, but it also left it open to the body to whom their services were transferred, to dismiss them in accordance with the terms of their service and to employ them on fresh terms.

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(1) (1907) 23 Times L. R. 493.

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(1) 84 L. J. (K.B.) 1869.

(2) Ibid. 1873.

I am not going to determine how far the principle that the meaning put on the words of an Act of Parliament by the Court must be followed if a later Act of Parliament uses the same words is binding for all time. Certain limitations, I have no doubt, must be put on it. I think myself, without determining it, that, for instance, if the Court comes to the conclusion that the words are plain and that the previous judgment was clearly wrong, it may then be incumbent on the Court to express its own views and not to adopt the previous construction. I should have more difficulty where the words were ambiguous, a meaning had been put on them, and they had been afterwards used in a fresh Act of Parliament. In that case it might well be that one would be obliged to follow the meaning which the Court had put on the words. There are, however, a large number of cases on the point, and the matter is, I think, still open for consideration.

In the present case I follow *Rowsell* v. *Metropolitan Water Board* (1), because I have put the same construction on the wording of s. 121 of the Local Government Act, 1929, as Lord Reading in that case put on the statute which he was considering. I think that s. 121 is only a transferring section, and is enacted to prevent the mere dissolution of the body from whom the services were transferred putting an end to the service of the persons employed. The object of the Legislature, I think, was to take care that those persons were transferred to the authority which was taking over the functions of the original authority with all the incidents of the service, so that they were employed by the new authority on exactly the same terms as they had been by the original authority. If the original authority were entitled to dismiss an employee and to re-engage him, or some one else, on different terms, so were the new authority after he had been transferred to them. In other words, the employee is put in no better position vis-à-vis the new authority than he was in vis-à-vis the original authority.

Mr. Montgomery argued that that really gave the go-by to the second half of s. 121, sub-s. 1, of the Act of 1929,

(1) 84 L. J. (K. B.) 1869.

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and said that, if it were the true construction, the sub-section ought to have ended at the words "the appointed day." There is great force in that argument, and I am not sure that it might not have been better if the wording of the sub-section had stopped at the word "day." But neither in Acts of Parliament, nor indeed in legal documents, is this the first time that superfluous words have been used. Sometimes they alter the meaning which is intended to be given, but here I do not think that they do.

The difficulty which I have felt in accepting Mr. Montgomery's argument with regard to the second half of the sub-section is in the word "entitled." If the wording had been "the salary which he is actually receiving or the salary which he would reasonably expect to receive," I should give effect to Mr. Montgomery's argument, but the wording is "the salary or remuneration to which he would have been entitled." To what is the transferred officer entitled? "Entitled," after all, is a word which implies some legal right, and the only legal right which I understand the plaintiff to have is the legal right contained in the terms of his engagement that he should be retained at the salary agreed for one week. I should find great difficulty in finding that the plaintiff was "entitled" to receive *4l.* a week, plus 91*l.* 10*s.* as emoluments, or, indeed, to find any sum to which I could say he was legally entitled.

For those reasons, both because I think that is the true construction of the Act, and because of the decision in *Rowsell* v. *Metropolitan Water Board* (1), I think that this action must be dismissed. Whatever Parliament had in mind when they enacted the Act, I am bound by the wording of the Act. It is my duty to construe the words and nothing else. In those circumstances, the action must be dismissed.

Judgment for defendants.

Solicitors for plaintiff: *Stutfield & Son.*

Solicitor for defendants: *J. R. Howard Roberts.*

(1) 84 L. J. (K. B.) 1869.

G. F. L. B.

THOMAS *v.* SAWKINS.

1935
May 30.

Police—Right to enter private premises—To attend meeting to which public invited—Reasonable anticipation of misdemeanour or breach of the peace.

The appellant was one of the conveners of a meeting held to protest against a Bill then before Parliament in a private hall which had been hired for the purpose by one of the other conveners of the meeting. The meeting was extensively advertised and the public were invited to attend it and no charge for admission was made. The respondent, a police sergeant, and other police officers were refused admission to the hall, but they insisted on entering it and remaining there during the meeting. No criminal offence was committed by any person at the meeting, nor was there any actual breach of the peace or disorder, but the respondent and the other officers had reasonable grounds for believing that, if they were not present at the meeting, seditious speeches would be made and that incitements to violence and breaches of the peace would occur:—

Held, that the respondent and the other officers were entitled, in the execution of their duty to prevent the commission of any offence or breach of the peace, to enter and remain on the premises.

Humphries v. *Connor* (1864) 17 Ir. C. L. R. 1; *O'Kelly* v. *Harvey* (1883) 14 L. R. Ir. 105; *Lansbury* v. *Riley* [1914] 3 K. B. 229, and dictum of Fitzgerald J. in *Reg.* v. *Queen's County Justices* (1882) 10 L. R. Ir. 294, at p. 301, applied.

CASE stated by Glamorgan (Newcastle and Ogmore) justices.

At a court of summary jurisdiction sitting at Bridgend on September 13, 1934, an information was preferred by the appellant, Alun Clydwyn Thomas, against the respondent, James Sawkins, a sergeant of the Glamorgan County Police Force, under s. 42 of the Offences against the Person Act, 1861, alleging that, on August 17, 1934, the respondent unlawfully assaulted and beat the appellant.

On the hearing of the information the following facts were proved or admitted:—

On August 17, 1934, a public meeting was held at the Large Hall of the Caerau Library to protest against the Incitement to Disaffection Bill then before Parliament and to demand the dismissal of the chief constable of the county of Glamorgan, at which meeting between 500 and 700 persons were present. The chairman of the meeting was one Richard Davies.

On August 9 the appellant had addressed a public meeting at Nantymoel from which he had asked police officers to withdraw. On their refusing to do so, he had lodged at the police station a written complaint against the action of the officers. On August 14 the appellant addressed a public meeting at Caerau at which he threatened physically to eject the police if they attended the then forthcoming meeting on August 17. On August 15 the appellant addressed a public meeting at Maesteg, about two miles distant from Caerau, at which he said: "If it were not for the presence of these people"—pointing to certain police officers who were present —"I could tell you a hell of a lot more."

The Caerau Library Hall was used for meetings and was hired for the meeting of August 17 by one Fred Thomas, who paid for the hire thereof. The public were invited to attend the meeting, but no charge for admission was made. The meeting was advertised extensively by posters in red chalk on paper and by the chalking of pavements by which the public were invited to "come in crowds." The appellant and Fred Thomas were two of the conveners of the meeting, but no evidence was given of who the other conveners, if any, were, or of the authority of the appellant to act on their behalf.

The respondent, with Police Inspector Richard Parry and Sergeant Stephen Lawrence, of the Glamorgan County Police Force, presented himself for admission to the meeting, and was informed by Fred Thomas at the entrance that he had been instructed not to admit any police officers. In spite of that the officers entered the hall and seated themselves in the front row seats of the meeting.

On his arrival, the appellant requested the police officers to leave the premises, but they refused to do so. The appellant then went to the police station, where he lodged a complaint against the officers for refusing to leave the meeting and gave an undertaking that "no breaches of the peace will occur if the police are immediately withdrawn." The appellant returned to the meeting, read the complaint to the police officers, and again requested them to leave, but they refused to do so.

The appellant then stated that the police officers would be ejected, and he laid his hand on Inspector Parry to eject him. The respondent thereupon pushed the appellant's arm and hand from Parry, saying: "I won't allow you to interfere with my superior officer." As a result of the entrance of other police officers, no further attempt was made to eject the police. In attempting to remove Parry, the appellant used no more force than was reasonably necessary for that purpose and the respondent used no more force than was reasonably necessary (assuming that he and Parry had a right to be there) to protect Parry and to prevent him from being ejected.

It was not alleged by the respondent that any criminal offence was committed by any person at the meeting at any time, apart from what was alleged in the summons. There was not in or about the meeting, and there had not been before the entrance of the police, any actual breach of the peace or disorder. The appellant and Fred Thomas were lawfully in possession of the hall and gave permission to members of the public to enter it.

On the part of the appellant it was contended that the premises on which the meeting was held were private premises to which neither the police nor the public had right of access; that any police officer who entered, or remained at, the meeting against the will of the conveners of the meeting was a trespasser; that the appellant was entitled to remove the respondent and other police officers, using no more force than was reasonably necessary; and that the respondent, in resisting removal and in the circumstances stated, committed an unlawful assault on the appellant.

On the part of the respondent it was contended that he had a legal right to enter the hall and remain there against the wishes of the appellant and Fred Thomas, and that he and the other police officers did so remain because, in the judgment of himself and the other officers (based on their experience and knowledge of previous meetings organized by the Communist Party at Caerau), it was to be anticipated that the meeting would become an unlawful assembly or a riot, or that breaches of the peace would take place, to the alarm of the residents of Caerau, and that seditious and inflammatory speeches were likely to be made at the meeting.

The justices were of opinion that the respondent and the other police officers had reasonable grounds for believing that, if they were not present at the meeting, there would be seditious speeches and other incitements to violence and breaches of the peace would occur; that they were entitled to enter and remain in the hall and meeting; and that, in consequence, the respondent did not unlawfully assault and beat the appellant. They accordingly dismissed the information and the appellant appealed.

Hon. Sir Stafford Cripps K.C., *Dingle Foot* and *Granville Slack* for appellant. The justices were wrong in not convicting the respondent. The general duties of a constable are to preserve the King's peace and with that object to keep watch and ward and to bring criminals to justice: Halsbury's Laws of England, vol. xxii., p. 497; Blackstone, Com., vol. i., p. 356; Stat. of Winchester, 1285. To perform those duties he may enter private premises without a warrant only to take a felon, where felony has been committed and a particular person is reasonably suspected to be the offender, where a felony is likely, or about, to be committed, where he hears an affray on the premises, or to pursue and arrest those who have taken part in an affray: Stone's Justices' Manual, 1935, p. 208; Burn's Justice of the Peace, 30th ed., vol. i., pp. 301, 303. In addition there are certain statutory provisions which empower a constable to enter private premises, e.g., Stat. 36 Geo. 3, c. 8, s. 14; Canal Boats Act, 1840, s. 9; Licensing (Consolidation) Act, 1910, s. 81; but those instances show that an enactment was considered to be necessary to give the constable in the cases specified a right which he did not possess at common law. There is no authority empowering a constable to enter private premises merely because he has a reasonable belief that an offence or a breach of the peace may be committed thereon.

Vaughan Williams K.C. and *Dapho Powell* for the respondent. The justices were right. The respondent was entitled to be present at the meeting. A constable by his oath swears to cause the peace to be preserved and to prevent the commission of all offences. Where, therefore, the police have reasonable grounds for believing that an offence may be committed or a breach of the peace occur, they have a right to enter private premises to prevent the commission of the offence or the occurrence of the breach of the peace. If that were not so, it would be extremely difficult for the police to exercise their powers of watch and ward and their duty of preventive justice. Their position would be reduced to impossibility and a great increase in disorder would result. In *Humphries* v. *Connor* (1) it was held that a police officer was entitled to commit a technical assault on a person to preserve the public peace. That case was approved in *O'Kelly* v. *Harvey* (2), where it was held a good defence in an action of assault that the defendant, a justice of the peace, believed on reasonable grounds that a breach of the peace would occur if a meeting were allowed to continue and laid his hand on the plaintiff in trying to disperse the meeting. The latter case is one example of the duty of " preventive justice " which devolves on magistrates and police alike, another example being the duty of a magistrate to bind a person to be of good behaviour to prevent the commission of reasonably apprehended breaches of the peace : *Lansbury* v. *Riley*. (3)

[They also referred to *Handcock* v. *Baker* (4) and *Hodder* v. *Williams*. (5)]

Hon. Sir Stafford Cripps, in reply, referred to *Duncan* v. *Dowding*. (6)

LORD HEWART C.J. It is apparent that the conclusion of the justices in this case consisted of two parts. One part

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(1) (1864) 17 Ir. C. L. R. 1.
(2) (1883) 14 L. R. Ir. 105.
(3) [1914] 3 K. B. 229.
(4) (1800) 3 Bos. & P. 260.
(5) [1895] 2 Q. B. 663.
(6) [1897] 1 Q. B. 575.

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was a conclusion of fact that the respondent and the police officers who accompanied him believed that certain things might happen at the meeting which was then about to be held. There were ample materials on which the justices could come to that conclusion. The second part of the justices' finding is no less manifestly an expression of opinion. Finding the facts as they do, and drawing from those facts the inference which they draw, they go on to say that the officers were entitled to enter and to remain on the premises on which the meeting was being held.

Against that determination, it is said that it is an unheard-of proposition of law, and that in the books no case is to be found which goes the length of deciding, that, where an offence is expected to be committed, as distinct from the case of an offence being or having been committed, there is any right in the police to enter on private premises and to remain there against the will of those who, as hirers or otherwise, are for the time being in possession of the premises. When, however, I look at the passages which have been cited from Blackstone's Commentaries, vol. i., p. 356, and from the judgments in *Humphries* v. *Connor* (1) and *O'Kelly* v. *Harvey* (2) and certain observations of Avory J. in *Lansbury* v. *Riley* (3), I think that there is quite sufficient ground for the proposition that it is part of the preventive power, and, therefore, part of the preventive duty, of the police, in cases where there are such reasonable grounds of apprehension as the justices have found here, to enter and remain on private premises. It goes without saying that the powers and duties of the police are directed, not to the interests of the police, but to the protection and welfare of the public.

It was urged in one part of the argument of Sir Stafford Cripps that what the police did here amounted to a trespass. It seems somewhat remarkable to speak of trespass when members of the public who happen to be police officers attend, after a public invitation, a public meeting which is to discuss

(1) 17 Ir. C. L. R. 1. (2) 14 L. R. Ir. 105.
(3) [1914] 3 K. B. 229, 236, 237.

as one part of its business the dismissal of the chief constable of the county. It is elementary that a good defence to an action for trespass is to show that the act complained of was done by authority of law, or by leave and licence.

I am not at all prepared to accept the doctrine that it is only where an offence has been, or is being, committed, that the police are entitled to enter and remain on private premises. On the contrary, it seems to me that a police officer has ex virtute officii full right so to act when he has reasonable ground for believing that an offence is imminent or is likely to be committed.

I think, therefore, that the justices were right and that this appeal should be dismissed.

AVORY J. I am of the same opinion. I think that it is very material in this particular case to observe that the meeting was described as a public meeting, that it was extensively advertised, and that the public were invited to attend. There can be no doubt that the police officers who attended the meeting were members of the public and were included in that sense in the invitation to attend. It is true that those who had hired the hall for the meeting might withdraw their invitation from any particular individual who was likely to commit a breach of the peace or some other offence, but it is quite a different proposition to say that they might withdraw the invitation from police officers who might be there for the express purpose of preventing a breach of the peace or the commission of an offence.

With regard to the general question regarding the right of the police to attend the meeting notwithstanding the opposition of the promoters, I cannot help thinking that that right follows from the description of the powers of a constable which Sir Stafford Cripps relies on in Stone's Justices' Manual, 1935, p. 208, where it is said that when a constable hears an affray in a house he may break in to suppress it and may, in pursuit of an affrayer, break in to arrest him. If he can do that, I cannot doubt that he has a right to break in to prevent an affray which he has reasonable cause to suspect may take place on private premises. In other words, it comes within his duty, as laid down by Blackstone (Commentaries, vol. i., p. 356), to keep the King's peace and to keep watch and ward. In my view, the right was correctly expressed in *Reg.* v. *Queen's County Justices* (1), where Fitzgerald J. said: "The foundation of the jurisdiction [to bind persons to be of good behaviour] is very remote, and probably existed prior to the statute of 1360–61; but whatever its foundation may be, or by whatever language conveyed, we are bound to regard and expound it by the light of immemorial practice and of decision, and especially of direct modern decisions. It may be described as a branch of preventive justice, in the exercise of which magistrates are invested with large judicial discretionary powers, for the maintenance of order and the preservation of the public peace." That passage was expressly approved in *Lansbury* v. *Riley* (2), and the statement of the law which it contains was adopted by Lord Alverstone C.J. in *Wise* v. *Dunning*. (3) In principle I think that there is no distinction between the duty of a police constable to prevent a breach of the peace and the power of a magistrate to bind persons over to be of good behaviour to prevent a breach of the peace.

I am not impressed by the fact that many statutes have expressly given to police constables in certain circumstances the right to break open or to force an entrance into private premises. Those have all been cases in which a breach of the peace was not necessarily involved and it, therefore, required express statutory authority to empower the police to enter. In my opinion, no express statutory authority is necessary where the police have reasonable grounds to apprehend a breach of the peace, and in the present case I am satisfied that the justices had before them material on which they could properly hold that the police officers in question had reasonable grounds for believing that, if they were not present, seditious speeches would be made and/or that a breach of the peace would take

(1) (1882) 10 L. R. Ir. 294, 301. *Reg.* v. *Queen's County Justices* is there referred to sub nom. *Reg.* v. *Cork Justices*, 15 Cox, C. C. 149.

(2) [1914] 3 K. B. 229, 236.

(3) [1902] 1 K. B. 167, 175;

place. To prevent any such offence or a breach of the peace the police were entitled to enter and to remain on the premises, and I agree that this appeal should be dismissed.

LAWRENCE J. As my Lord has pointed out, our judgment proceeds on the particular facts of this case, and on those facts I agree with the conclusion. I will only add that I am unable to follow the distinction which Sir Stafford Cripps has drawn between the present matter and the cases which have been cited. If a constable in the execution of his duty to preserve the peace is entitled to commit an assault, it appears to me that he is equally entitled to commit a trespass.

Appeal dismissed.

Solicitor for appellant: *W. H. Thompson.*

Solicitors for respondent: *Boxall & Boxall, for W. P. David & Snape, Bridgend.*

G. F. L. B.

DRUCE AND COMPANY, LIMITED *v.* BEAUMONT PROPERTY TRUST, LIMITED.

1935
May 22.

[1935. D. No. 283.]

Landlord and Tenant — Distress — Levy on Goods of third Person — Declaration by third Person of ownership served on Landlord —Omission of statement that goods not outside protection of Act— Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *ss.* 1, 4.

By s. 1 (*c*) of the Law of Distress Amendment Act, 1908, if a superior landlord levies a distress on the goods of any person not being a tenant of the premises and not having any beneficial interest in any tenancy of the premises, such person may serve the superior landlord with a declaration in writing setting forth that the immediate tenant "has no right of property or beneficial interest in the . . . . goods . . . . so distrained . . . . upon, and that such . . . . goods . . . . are the property or in the lawful possession of such . . . . person aforesaid, and are not goods . . . . to which this Act is expressed not to apply":—

Held, that omission to state that the goods were not goods to which the Act was expressed not to apply is a fatal defect in a declaration.

ACTION tried by Horridge J. without a jury.

The plaintiffs, Druce & Co., Ld., furniture dealers, claimed damages from the defendants, Beaumont Property Trust, Ld., for illegal distress.

The plaintiffs entered into two hire purchase agreements, dated May 8 and May 9, 1934, with a Mr. Louis Scott, for the furnishing of two flats, occupied by him as tenant of the defendants, Nos. 102 and 111, 20 Abbey Road, N.W. 8. These agreements were terminated by notices in writing dated August 2, 1934, and accordingly the goods ceased to be in the lawful possession of Mr. Scott. On August 30, 1934, the defendants levied a distress for arrears of rent, due from Mr. Scott, on the contents of flat No. 102, seizing part of the plaintiffs' furniture of the value of 111*l.* On August 31 they levied a distress on flat No. 111, seizing the plaintiffs' furniture of the value of 59*l.* On September 7, 1934, the plaintiffs served on the defendants two declarations purporting to be declarations under s. 1 of the Law of Distress Amendment Act, 1908. (1) The declaration in respect of flat No. 111 was in

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(1) Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 1: "If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods, or chattels of . . . . (*c*) any . . . . person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof, for arrears of rent due to such superior landlord by his immediate tenant, such . . . . person aforesaid may serve such superior landlord . . . . with a declaration in writing made by such . . . . person aforesaid, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained . . . . upon . . . . and that such furniture, goods, or chattels are the property or in the lawful possession of such . . . . person aforesaid, and are not goods or live stock to which this Act is expressed not to apply . . . . and to such declaration shall be annexed a correct inventory. . . . ."

By s. 2 if a landlord levies any distress after service of such declaration and inventory on such furniture, &c., he shall be deemed guilty of an illegal distress.

Sect. 4: "This Act shall not apply—(1.) to goods belonging to the husband or wife of the tenant whose rent is in arrear, nor to goods comprised in any bill of sale, hire purchase agreement, or the following terms: "Declaration by owner of distrained goods that they are his (8 Edw. 7, c. 53). Sir, We, Druce & Co., Ld., of 37 Baker Street, London, W., do hereby declare that Mr. L. Scott, the immediate tenant of the Beaumont Property Co. [*sic*], Ld., has no right of property or beneficial interest in the furniture, goods and chattels distrained at flat No. 111, 20 Abbey Road, N.W. 8, for rent alleged to be due to the Beaumont Property Co. [*sic*], Ld., and an inventory whereof is annexed hereto, but that such furniture, goods or chattels are our property." The declaration with respect to flat No. 102 was in similar terms. Before the delivery of this declaration the plaintiffs' solicitors had written to the defendants informing them that all the furniture had been the subject of a hire purchase agreement which had been determined.

The plaintiffs claimed that the distress levied by the defendants was in violation of s. 2 (1) and was therefore an illegal distress. The defendants maintained that the distress was good, because the declaration omitted the words in s. 1 (1): "and are not goods . . . . to which this Act is expressed not to apply."

Tristram Beresford for the plaintiffs. The declaration was a valid one; its form was based on that given in Woodfall's Landlord and Tenant, 23rd ed., p. 1328. The same form

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settlement made by such tenant, nor to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof, nor to any live stock to which section twenty-nine of the Agricultural Holdings Act, 1908, applies."

Sub-s. 2: "(*a*) to goods of a partner of the immediate tenant; (*b*) to goods (not being goods of a lodger) upon premises where any trade or business is carried on in which both the immediate tenant and the under tenant have an interest; (*c*) to goods (not being goods of a lodger) on premises used as offices or warehouses where the owner of the goods neglects for one calendar month after notice (which shall be given in like manner as a notice to quit) to remove the goods and vacate the premises; (*d*) to goods belonging to and in the offices of any company or corporation on premises the immediate tenant whereof is a director or officer, or in the employment of such company or corporation. . . . ."

(1) Ante, p. 258, note (1).

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DRUCE & CO. v. BEAUMONT PROPERTY TRUST.

is given in Dunstan's Law of Hire Purchase, 3rd ed., p. 173. In the Encyclopædia of Forms and Precedents, 2nd ed., Vol. 8, p. 696, Form 243, however, the words omitted from the declaration in question are set out. In *Rugby School (Governors)* v. *Tannahill* (1) the omission from a notice to quit of a requirement that the tenant should make compensation for the alleged breach did not invalidate it though the statute then in question enacted that such requirement should form part of the notice. Again in *Ex parte Harris* (2), where a lodger was resisting a distraint on his goods for rent due from the tenant, his immediate landlord, to the superior landlord, he omitted to state in his notice to the superior landlord " whether any and what rent is due . . . . from such lodger " as required by s. 1 of the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79). As in fact no rent was due the omission was held not to invalidate the notice. These cases show that the omission from the notice of matters required by statute to be therein set forth does not necessarily invalidate it. The defendants knew from the letter of the plaintiffs' solicitors that the goods were no longer comprised in a hire purchase agreement, and were not goods in the possession, order, or disposition of the tenant by the consent and permission of the true owners, the plaintiffs, under such circumstances that the tenant was the reputed owner thereof, nor would they think that the goods came within any of the other goods declared by s. 4 of the Act of 1908 (3) to be goods to which the Act does not apply. Therefore the insertion of the words " and are not goods or live stock to which this Act is expressed not to apply " would have been mere surplusage.

Astell Burt for the defendants. The Act of 1908 very seriously curtailed the rights of the landlord to distrain, but at the same time it did give him a certain degree of protection, which took the form of providing that a person, other than the tenant, resisting a distress of his goods for the tenant's rent, must serve a declaration that the goods are not goods to which the Act is expressed not to apply. The plaintiffs contend that as the defendants knew the facts such notice was unnecessary. Taken to its logical conclusion this would in many cases dispense with the necessity for any declaration at all. A plaintiff should set out three things in the declaration: (1.) that the goods do not belong to the tenant; (2.) that they do belong to the plaintiff; and (3.) that they are not within s. 4 of the Act, which declares what goods are not within the protection of the Act. Bowen L.J. in *Thwaites* v. *Wilding* (1) said: "I think it clear that a lodger is relieved only when the terms of the Lodgers' Goods Protection Act have been rigidly complied with." The decisions in *Rugby School* (*Governors*) v. *Tannahill* (2) and *Ex parte Harris* (3) turned on the construction of the particular statutes there in question.

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(1) [1935] 1 K. B. 87.

(2) (1885) 16 Q. B. D. 130.

(3) Ante, p. 258, note (1).

Tristram Beresford in reply referred to Broom's Legal Maxims, 7th ed., p. 427.

HORRIDGE J. The facts in this case are not in dispute, and as I have formed a very clear opinion of what the law is I do not propose to reserve my judgment.

The goods, the subject-matter of this action, were hired out by the plaintiffs to one Scott. Before the distress in question was levied the hire purchase agreement had been brought to an end, and it has not been disputed by Mr. Burt, for the defendants, that the goods were no longer subject to the hire purchase agreement, because that agreement had, in fact, been legally determined in such a way as to bring the case within the decision in *Smart Brothers, Ld.* v. *Holt.* (4) Now the point upon which the case turns is whether or not a proper declaration has been served within the Law of Distress Amendment Act, 1908. That Act considerably impinged on the rights of the landlord as regards distress, but before those rights were so impinged upon it provided that certain formalities should be gone through. In dealing with goods claimed by a third party, s. 1 provides that a third party whose goods have been distrained upon

(1) (1883) 12 Q. B. D. 4, 7.
(2) [1935] 1 K. B. 87.
(3) 16 Q. B. D. 130.
(4) [1929] 2 K. B. 303.

may serve the landlord, or the bailiff or agent "with a declaration in writing made by such . . . . other person aforesaid," —that is, the third party—" setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such . . . . other person aforesaid, and are not goods or live stock to which this Act is expressed not to apply." The third party has to set out three things: (1.) that the tenant has no interest; (2.) that the person claiming has; and (3.) that such goods "are not goods . . . . to which this Act is expressed not to apply." That declaration, if falsely made, entails penalties: Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 5 (*a*). In this case a declaration was served upon the proper parties, but it does not contain any statement that the goods are not goods to which the Act of 1908 is expressed not to apply. Under s. 4 of that Act certain goods are stated to be outside the Act and, therefore, not privileged in any way from distress. Sub-s. 1 of that section deals with goods which are in the order, possession, or disposition of the tenant, although they are the property of somebody else. These goods might conceivably have been in the order, possession, or disposition of the tenant if it had not been for the termination of the hire purchase agreement, and I think the Act of Parliament required the person claiming the goods to state by way of declaration the fact that these goods were not goods which were liable to distress; in other words, they were not goods which were in the order, possession, or disposition of the tenant. Sub-s. 2 contains provisions as to other goods which are not to be exempted from distress, and as to these also I think it necessary that the declaration should show that the goods in question are not either within sub-s. 1 or sub-s. 2 of s. 4 of the Act. I think the landlord was entitled to have the protection of a declaration, enforceable by criminal proceedings in the way to which I have referred, as to matters which were neccessary for him to know before deciding whether to continue with the distress or not, and he was entitled to have the declaration in the form prescribed by the Act of Parliament. That condition was not satisfied, and, in my view, therefore, the distress did not become illegal, and the plaintiffs' claim fails.

Two cases have been cited to me to which perhaps I ought to refer. The first case was *Rugby School* (*Governors*) v. *Tannahill.* (1) That was a case not under this Act of Parliament at all, but under s. 146 of the Law of Property Act, 1925, which re-enacted s. 14 of the Conveyancing Act, 1881. The question there was whether or not a proper notice had been served so as to entitle the plaintiff to possession of the property, or, in other words, whether the notice required by s. 146 of that Act had been served so as to give the plaintiff the right to exercise his right of forfeiture. Two questions arose on that notice. It did not state that the tenant was required to remedy the breach under s. 146, sub-s. 1 (*b*), nor did it state what compensation was required under sub-s. 1 (*c*). The Court of Appeal in that case held that on the true construction of the section the right to require the breach to be remedied applied only to cases where the breach could be remedied, and that in the case in question the breach could not be remedied. On the second point, whether compensation should be demanded, they followed a previous decision in the Court of Appeal under the corresponding section of the Conveyancing Act, 1881, s. 14, in *Lock* v. *Pearce* (2), which held that if the landlord required no compensation there was no occasion for him to state anything about compensation in his notice. Those two cases seem to me to turn entirely upon the construction of that section of the Act of Parliament, and to have no application to the construction of the section with which I have to deal.

The other case which was cited was a case of *Ex parte Harris* (3), where it was held that where no rent was due by the tenant there was no necessity for the lodger to state whether any and what rent was due. Lord Esher, in giving judgment, says (4): "That seems to me to

(1) [1935] 1 K. B. 87.
(2) [1893] 2 Ch. 271.
(3) 16 Q. B. D. 130.
(4) Ibid. 132.

show that the proper reading of the provision is that the declaration is to state what rent, if any, is due, and for what period." That was under a similar section—namely, s. 1 of the Lodgers' Goods Protection Act, 1871. That again was the construction of that particular section, and that construction was that the section said that if any rent was due it had to be stated, and as no rent was due there was no occasion to state it.

I should just like to mention one or two matters which seem to me to point to the result that unless the requirements as to this declaration are strictly complied with the third parties, the plaintiffs in this case, are not entitled to the protection given by the Act. First, I will refer to the language of Bowen L.J. in *Thwaites* v. *Wilding* (1): "I think it clear that a lodger is relieved only when the terms of the Lodgers' Goods Protection Act have been rigidly complied with"; and again, Bray J. in *Hackney Furnishing Co* v. *Watts* (2) says this: "It must be remembered that the statute is one depriving the landlord of a part of his common law right to distrain. The words must not be strained so as to further restrict his rights."

In my opinion, this section has to be strictly complied with. It has not been complied with in this case, and there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiffs: *Lindus & Hortin.*
Solicitors for defendants: *Wedlake, Letts & Birds.*

W. L. L. B.

(1) 12 Q. B. D. 4, 7.

(2) [1912] 3 K. B. 225, 232.

SWAN *v.* PURE ICE COMPANY, LIMITED.

C. A.
1935
Feb. 26;
March 15.

Workmen's Compensation—Injury by accident—Weekly payments—Redemption—Death of workman—Dependants—Claim by widow—"Lump sum payable"—Amount of redemption payment to be deducted from children's allowance—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5. *c.* 84), *s.* 8.

By s. 8, sub-s. 2 (iii.), of the Workmen's Compensation Act, 1925, there is to be deducted from the lump sum payable under s. 8, sub-s. 1, as calculated under s. 8, sub-s. 2 (i.), "the amount of weekly payments (if any) made to the workman before his death so, however, as not to reduce the lump sum below two hundred pounds; and if such weekly payments have been redeemed under this Act, there shall also be deducted the amount paid in respect of the redemption thereof." By s. 8, sub-s. 3 (iii.): "No deduction shall be made from the children's allowance in respect of the amount of any weekly payments which may have been made to the workman under this Act in respect of the same injury, but if such weekly payments have been redeemed the amount paid in redemption thereof, if and so far as it exceeds the lump sum payable, shall be deducted from the amount of the children's allowance as ascertained under the foregoing rules."

A workman entitled to compensation under the Workmen's Compensation Act, 1925, after receiving weekly payments amounting to 115*l.* 10*s.*, was paid a sum of 750*l.* in redemption of all further payments. He subsequently died as the result of the injuries from the accident for which he had been paid compensation:—

Held, that in calculating the amount payable as compensation under s. 8 of the Act to his widow and children, under s. 8, sub-s. 2 (iii.), the amount paid to him weekly must be deducted from the lump sum payable to the widow, which was 300*l.*, so as not in any case to reduce that sum to less than 200*l.* Then under s. 8, sub-s. 3 (iii.), the sum of 200*l.* left must be deducted from the redemption sum of 750*l.* and the remainder of the 750*l.*, namely, 550*l.*, must be deducted from the amount of the children's allowance, which, calculated in accordance with s. 8, sub-s. 3 (i.), was 788*l.* 2*s.*, and that the amount therefore payable on the death of the workman was 238*l.* 2*s.*

Per Romer L.J.: "The literal construction of the words 'lump sum payable' in s. 8, sub-s. 3 (iii.), must be rejected and the words read as meaning the lump sum which would have been payable if there had been no redemption of the weekly payments."

APPEAL from an award of the judge of the Mayor's and City of London Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

C. A.
1935

SWAN
v.
PURE ICE
CO.

The following statement of the facts is taken from the written judgment of the Master of the Rolls.

This is an appeal from a decision given herein on September 24, 1934, whereby it was declared that Caroline Swan, the widow and dependant of a workman, John Swan, was entitled to have paid into court the sum of 38*l*. 2*s*. and no more, whereas the true sum to which she claims to be entitled on this appeal is 238*l* 2*s*.

The facts are fully stated in the learned judge's judgment and must be recalled here. The deceased workman, in the course of his employment, which had lasted for more than three years preceding his injury, met with an accident on September 4, 1926, entitling him to compensation at the rate of 30*s*. a week. He was paid compensation at that rate up till July 2, 1928, the total amount so paid to him being 115*l*. 10*s*. On July 2, 1928, the weekly payments were redeemed by a payment of 750*l*. On April 15, 1934, he died as a consequence of the accident, leaving his widow and seven children under the age of fifteen wholly dependent. The amount of the children's allowance, calculated in accordance with s. 8, sub-s., 3 (i.) is 788*l*. 2*s*. The question that we have to decide is what compensation, if any, is the applicant entitled to. For the applicant it was argued that she is entitled to an award of 238*l*. 2*s*., or at all events to an award of 38*l*. 2*s*. The respondents contend that they have already paid all that they are bound to pay, but that in any case not more than 38*l*. 2*s*. is payable.

The county court judge held that the applicant was only entitled to 38*l*. 2*s*.

The applicant appealed. The appeal was heard on February 26, 1935.

Montague Berryman for the appellant.

Phineas Quass for the respondents.

The arguments sufficiently appear from the judgments.

Cur. adv. vult.

March 15. LORD HANWORTH M.R. read the following judgment, in which, after stating the facts as above set out, he continued: The case depends on the construction of s. 8 of the Act of 1925, which deals with the amount of compensation payable in case of the death of a workman in various circumstances. Sub-s. 1 of that section provides, in substance, that where death results from the injury the compensation payable shall be (*a*) a lump sum calculated in accordance with the rules in sub-s. 2, and, in addition, (*b*) a children's allowance calculated in accordance with the rules in sub-s. 3, but with the proviso that both (*a*) and (*b*) together are not to exceed 600*l*. The respondents contend here, among other things, that the scheme of the Act, as shown in sub-s. 1, is that in no circumstances can the dependants of a deceased workman get more than 600*l*., and here the family had already had 865*l*. 10*s*.—namely, 115*l*. 10*s*., plus 750*l*.—before the death, and therefore upon the death are not entitled to any further payment. I agree with the learned judge that it is not possible for this Court to entertain that argument, having regard to the decision of the Court of Appeal in *Malcolm* v. *Barber, Walker & Co.* (1), which was followed by the Scottish Court of Session in *Farrell* v. *Murdostoun Colliery Co.* (2) It is clear from those decisions that there may be cases in which the employers may be required to pay more than 600*l*. in the aggregate.

The latter case, *Farrell* v. *Murdostoun Colliery Co.* (2), is an authority, which I respect, for determining that the lump sum and the children's allowance are to be calculated separately. It is after those separate calculations have been made that the limit of both sums to 600*l*. comes into force. This results from the words of s. 8 under which a lump sum is to be calculated, and also an additional sum "hereinafter referred to as the children's allowance" if the facts as to the children warrant a separate calculation being made for them, "so, however, that the lump sum and children's allowance (which shall be added together and dealt with as a single sum) shall not in any case exceed in the aggregate 600*l*."

The calculation of the lump sum is made as follows: First

(1) (1927) 20 B. W. C. C. 516. (2) (1930) 23 B. W. C. C. 639.

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of all, under sub-s. 2 (i.), a sum is to be ascertained equal to the workman's earnings in the employment of the same employer during the three years next preceding the injury. That would be 468*l.*, but it is cut down to 300*l.* by the last words of the sub-section.

Then by clause (iii.) there is, first, to be deducted from the sum to be calculated the amount of weekly payments made to the workman before his death—that is 115*l.* 10*s.*—but the prohibition that the lump sum is not to be reduced below 200*l.*, leaves the lump sum at 200*l.* Then if the weekly payments have been redeemed, there is also to be deducted the amount paid in redemption thereof. 750*l.* had been paid in redemption, so the lump sum becomes a minus sum of 550*l.*

Next under sub-s. 3 the children's allowance has to be calculated and it is agreed that the calculation at the figure of 788*l.* 2*s.* is correct. Sub-s. 3 (iii.) has then to be followed. It states: ". . . . if such weekly payments have been redeemed the amount paid in redemption thereof, if and so far as it exceeds the lump sum payable, shall be deducted from the amount of the children's allowance as ascertained under the foregoing rules." Unless the amount paid in redemption is to be taken into account—in part at least—twice over the amount paid in redemption that remains unaccounted for is 550*l.* and no more. If this be deducted from the 788*l.* 2*s.* it leaves 238*l.* 2*s.* payable as the children's allowance.

But it is argued that the lump sum payable is zero, and so that 750*l.* should be deducted from the children's allowance of 788*l.* 2*s.*, leaving 38*l.* 2*s.* as the figure for that allowance and no more.

This view has been accepted by the learned judge, but I am unable to accept it. It carries with it the allowance of the 750*l.* in part from the lump sum, and also in whole from the 788*l.* 2*s.*, which is an unreasonable penalty to be suffered by the dependant widow and the children.

It is difficult to give such an interpretation to an Act which was passed, in general, for the benefit of workmen and their dependants—to give "compensation to workmen for injuries suffered in the course of their employment," and to this section in particular, which estimates the amount of compensation to be paid to their dependants in fatal cases. It must be remembered that the benefits given to dependants under Sch. I. of the Act 1906 were enlarged by the amending Act of 1923, and the present Act consolidates those two Acts, and certainly gives no example of curtailing the benefits allowed to workmen.

To maintain the decision of the county court judge, the words " lump sum payable " must be interpreted as meaning the lump sum after it has been adjusted under sub-s. 2, cl. (iii.) and either reduced or wiped out accordingly. If it means the lump sum as first calculated under cl. (i.) no difficulty arises. It means then " prima facie " payable.

I think that the rule of construction of a statute which Bowen L.J. applied in *Curtis* v. *Stovin* (1) must be applied here: " If it is possible, the words of a statute must be construed so as to give a sensible meaning to them. The words ought to be construed ut res magis valeat quam pereat."

A construction other than that which I have adopted would lead to results which will be pointed out in the judgment of Romer L.J.—results which would be unfair to the dependants and contrary to the spirit of the Act.

For these reasons the appeal must be allowed and the award entered for the sum of 238*l.* 2*s.* as asked in the notice of appeal, with costs.

ROMER L.J. read the following judgment: The question to be decided on this appeal is as to the proper construction of s. 8, sub-s 3. (iii.) of the Workmen's Compensation Act, 1925. The facts have already been stated by the Master of the Rolls and I need not refer to them further. On those facts we have to decide whether, in ascertaining the amount of the children's allowance, there ought to be deducted from 788*l.* 2*s.* the sum of 750*l.*, or only the sum of 550*l.* The answer to this question turns on the meaning of the words " the lump sum payable " in the sub-section to which I have referred.

For the purpose of construing those words it is legitimate to consider the provisions in the earlier Acts relating to the compensation payable where the death of a workman resulted from an accident. For the Act of 1925 was a consolidating Act repealing the Workmen's Compensation Acts of 1906 and 1923.

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(1) (1889) 22 Q. B. D. 513, 517.

By para. 1 (*a*) of the First Schedule to the earlier of these Acts it was provided, so far as material as follows :—

"1. The amount of compensation under this Act shall be—(*a*) where death results from the injury—

(i.) if the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act, and any lump sum paid in redemption thereof, shall be deducted from such sum. . . . ."

It will be seen that the amount payable under this section in no way depended on the number of dependants left by the deceased. It will be further seen that under that Act the widow and children in the present case would have received no compensation at all. The Act of 1906 was, however, materially amended in this respect by that of 1923. Sect. 2 of that Act is, so far as material, in these terms :—

"2. Where a workman leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and, in addition, leaves one or more children under the age of fifteen so dependent, then—

(*a*) if both the widow or other member of the workman's family and such child or children as aforesaid were all wholly dependent on the workman's earnings, there shall, in respect of each such child, be added to and dealt with as part of the compensation payable under paragraph (1) (*a*) of the First Schedule to the principal Act, a sum equal to fifteen per cent. of the amount arrived at by multiplying the average weekly earnings of the workman, or where such earnings are less than one pound, then by multiplying one pound, or where such earnings exceed two pounds then by multiplying two pounds, by the number of weeks in the period between the death of the workman and the date when the child will attain the age of fifteen, fractions of a week being disregarded . . . .

Provided that the total amount of compensation payable to the dependants shall in no case exceed six hundred pounds."

By s. 3 the sum of 200*l.* was substituted for 150*l.* in para. 1 (*a*) of the First Schedule to the Act of 1906. The result of this Act, if it had been applicable in the present case, would have been that a sum of 788*l.* 2*s.* would have been added to and dealt with as part of the compensation payable under para. 1 (*a*) of the First Schedule to the Act of 1906. But, as nothing would have been payable as compensation under that paragraph, the total sum available for the dependants would, at first sight, appear to have been 788*l.* 2*s.* but for the proviso. In view of the proviso it would have been 600*l.*

It might, however, have been argued on the part of the employers that this was not giving full effect to the words "added to and dealt with as part of the compensation payable under paragraph 1 (*a*)." For though the deduction of the 750*l.* would have resulted in no compensation being actually payable under the paragraph, nevertheless, for the purpose of being added mathematically to the 788*l.* 2*s.* and treated as forming with it one indivisible whole, it should be regarded as being a minus quantity—namely, the difference between the sum (in the present case) of 300*l.* on the one hand and the total of the weekly payments made to the workman and the redemption sum on the other hand. This difference would have been a sum of 565*l.* 10*s.*, and the total compensation would on that footing have amounted to 222*l.* 12*s.* In this connection it should be observed that in accordance with para. 1 (*a*) of the First Schedule to the Act of 1906, not only would the 750*l.* have been deductible from the 300*l.* maximum, but the weekly payments made, which amounted to 115*l.* 10*s.*, would be deducted also. In this respect the consolidating Act of 1925 has effected an amendment as will presently appear. For the moment it is sufficient to point out that under the Act of 1923 the additional compensation provided by s. 2 would, on its literal construction, have had nothing deducted from it at all in respect of the redemption payment, but, if the alternative construction is to prevail, would merely have had deducted from it so much of such payment as had not been set off against the 300*l.* It may be doubted whether this alternative construction ought to have prevailed; but it is, at any rate, a possible construction.

I must now turn to s. 8 of the Act of 1925.

Sub-sect. 1 begins: "The compensation under this Act where death results from the injury shall be a lump sum of an amount calculated in accordance with the rules hereinafter contained."

Let me stop there for a moment and read the material parts of sub-s. 2, cls. (i.) and (iii.).

Clause (i.) reads: "If the workman leaves any dependants wholly dependent on his earnings, the lump sum shall be a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of two hundred pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds."

Clause (iii) reads: "There shall be deducted from the sum as above calculated the amount of weekly payments (if any) made to the workman before his death so, however, as not to reduce the lump sum below two hundred pounds; and if such weekly payments have been redeemed under this Act, there shall also be deducted the amount paid in respect of the redemption thereof."

So far, this merely incorporates the provisions of para. 1 (*a*) of the First Schedule to the Act of 1906 (as amended by s. 3 of the Act of 1923) for ascertaining the sum payable as compensation under that paragraph, except that such sum is now referred to as the lump sum, and such lump sum before deduction of any redemption payment is not to be less than 200*l.*

I must now return to sub-s. 1 at the place where I broke off

". . . . contained, together with, if the workman leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and in addition leaves one or more children under the age of fifteen so dependent, an additional sum (hereinafter referred to as the children's allowance) of an amount calculated in accordance with the rules hereinafter contained, so, however, that the lump sum and children's allowance (which shall be added together and dealt with as a single sum) shall not in any case exceed in the aggregate six hundred pounds."

Then sub-s. 3 (i.) provides for a calculation of the children's allowances in precisely the same way as the additional compensation provided by s. 2 (*a*) of the Act of 1923 had to be calculated.

If s. 8 finished there it would have effected no change in the law except for the introduction of 200*l.* as the minimum amount of the lump sum before deduction of anything paid for redemption of weekly payments. There might, therefore, have been the same doubt as to the effect of the provision that the lump sum and the children's allowance should be added together and dealt with as a single sum, as was caused by the similar provision in s. 2 (*a*) of the Act of 1923. With this important exception, however: The deduction of the weekly payments from the lump sum could never result in a minus quantity, as might have been the case under para. 1 (*a*) of the First Schedule to the Act of 1906. In cases, therefore, where the weekly payments had never been redeemed, the children's allowance would never be reduced by being added to and dealt with as a single sum with the lump sum, even if these words were to be construed in the way I have previously suggested. The children's allowance could only be reduced where the weekly payments had been redeemed, and then only if and so far as the lump sum was less in amount than the sum paid for redemption.

The Act of 1925 would accordingly, in the absence of sub-s. 3 (iii.), have resulted in the dependants in the present case receiving 600*l.* on a literal construction of sub-s. 1, and 238*l.* 2*s.* on the other construction.

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I must now turn to sub-s. 3 (iii.). It is in these words: "No deduction shall be made from the children's allowance in respect of the amount of any weekly payments which may have been made to the workman under this Act in respect of the same injury, but if such weekly payments have been redeemed the amount paid in redemption thereof, if and so far as it exceeds the lump sum payable, shall be deducted from the amount of the children's allowance as ascertained under the foregoing rules."

It is to be observed that, if the words "lump sum payable" be construed as meaning "lump sum payable before deduction of the amount paid in redemption," the sub-section would be merely making it clear that the words "shall be added together and dealt with as a single sum" in sub-s. 1 were intended to have the second of the two meanings to which I have referred.

The Act of 1925 is, as already pointed out, a consolidating one and, prima facie, it is unlikely that the Legislature intended to make any startling changes in the existing law. But when re-enacting that law it would be necessary for Parliament to determine what was the effect of it and for that purpose to put a construction upon s. 2 (*a*) of the Act of 1923. If that sub-section be construed literally, then sub-s. 3 (iii.) of the Act of 1925, however it be read, made a most important change in the law. If it be construed in the other way, then sub-s. 3 (iii.) of s. 8 makes no substantial change in the law unless the words "lump sum payable" be read literally. In these circumstances it seems to me highly probable that the Legislature in 1925 construed the words of s. 2 (*a*) of the Act of 1923 as providing for a reduction of the "children's allowance" by the excess of the deductions mentioned in para. 1 (*a*) of the 1906 Schedule over the sum mentioned in that paragraph, and intended the words "lump sum payable" not to be read literally but to have the meaning to which I have already referred. To read these words literally would lead inevitably to the conclusion that the sub-section had made an important and somewhat startling change in the law. Take, for example, the case of dependants who, under the Act of 1906, would have been entitled to 200*l.* if the workman's weekly payments had not been redeemed, and to 400*l.* under s. 2 (*a*) of the Act of 1923 on the same hypothesis. If now it be assumed that such weekly payments had been redeemed for 200*l.*, the dependants would have received nothing under the Act of 1906 but would have got 400*l.* under the Act of 1923. Under the Act of 1925, however, if sub-s. 3 (iii.) be read literally, the lump sum payable would be nothing, and the children's allowance would be reduced by 200*l.*, the excess of the redemption payment over the lump sum payable. The consolidating Act would thus result in a reduction of 200*l.* in the compensation payable.

But not only would the Act of 1925 on a literal construction of the words "the lump sum payable" have effected an important alteration in the law seriously reducing the amount payable to the dependants in many cases, it would also lead to absurd results. Let it be supposed in the case I have just dealt with that the sum paid for the redemption of the weekly payments was 150*l.* instead of 200*l.* The lump sum payable would then be 50*l.*, and the children's allowance would be 300*l.* —namely, 400*l.* less the excess of 150*l.* over 50*l.* The dependants would therefore receive 350*l.* In other words, an increase in the redemption payment of 50*l.* would result in a diminution of the sum payable to the dependants of 150*l.* There would be no sense in this, and it is inconceivable that the Legislature could have intended any such result. If, however, the words "lump sum payable" be read as meaning the lump sum before deduction of the redemption payment, the dependants would receive 400*l.* where the redemption payment was 200*l.*, and 450*l.* where such payment was 150*l.* This result would not only be consistent with common sense, but would give the dependants the same compensation as they would have got under the Acts of 1906 and 1923, whatever construction had been placed on s. 2 (*a*) of the latter Act. The question of the true construction of that section would only become important if the redemption payment in the case supposed exceeded the 200*l.* If, for instance, it had been 250*l.* the total compensation under the earlier Acts would have been on one view of s. 2 (*a*) the sum of 400*l*., and on the construction which I believe was the one adopted by the Legislature would have been 350*l*. Under the Act of 1925, if the words "lump sum payable" be construed literally, the total compensation would in the case supposed be 150*l*. If, however, these words be construed in the way I have suggested the total sum payable as compensation would be 350*l*.

In these circumstances I am of opinion that the literal construction of the words "lump sum payable" in s. 8, sub-s. 3 (iii.) of the Act of 1925 must be rejected and the words read as meaning the lump sum which would have been payable if there had been no redemption of the weekly payments. This construction was the one that commended itself to Sargant L.J., in *Malcolm* v. *Barber, Walker & Co.* (1) It is true that, as pointed out by the learned county court judge in the present case, the observations of the Lord Justice were no more than obiter dicta. But they were, in my judgment, amply justified by the authorities, which are summed up in Maxwell on the Interpretation of Statutes, 7th ed., p. 217, as follows:—"They (i.e., the authorities) would seem rather to establish that the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention and that his amendment probably does."

For the reasons which I have given I am satisfied, both from the history of the enactment and from the injustice and absurdity of the consequences to which it would lead, that the language of sub-s. 3 (iii.) does not really express the intention, and that my amendment probably does.

In my opinion the appeal must be allowed with the results stated by the Master of the Rolls.

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(1) 20 B. W. C. C. 516, 529.

MAUGHAM L.J. The facts having been fully stated by the Master of the Rolls, it is not necessary for me to repeat them; but I will endeavour to express, in my own language, my reasons for agreeing with the conclusions at which my brethren have arrived.

The question turns on the true construction of an admittedly difficult section—s. 8 of the Workmen's Compensation Act, 1925. I may say, before proceeding to construe it, that it is well settled that the rights of dependants under this section are derived directly from the statute and not from or through the workman in any sense. The amount to be paid under s. 8 in the case of death is an amount which consists, if the deceased workman "leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and in addition leaves one or more children under the age of fifteen so dependent," of two separate items which have to be added together so as to produce what is called in line 2 of sub-s. 1 a "lump sum," together with an additional sum. For the sake of clarity I will describe the lump sum as "A" and the additional sum, which is defined as the "children's allowance," as "B." There is at the end of sub-s. 1 a definite statement, using the terms which I have adopted, that "A" plus "B" must not exceed 600*l.* Sub-s. 2 contains a provision for certain deductions from "A"; and here, I think, the draftsman has unfortunately used language which causes a certain amount of difficulty. The deductions are to be those specified in cl. (iii.) of sub-s. 2. They are of two kinds: one, "the amount of weekly payments (if any) made to the workman before his death," with the proviso that the deduction is "not to reduce the lump sum below 200*l.*" The second kind of deduction is of the amount paid in respect of the redemption of the weekly payments, if the weekly payments have been redeemed. As regards the second class of deduction, there is no provision, such as there is with regard to the deduction of the payment of the weekly amounts, that the lump sum is not to be reduced below any particular figure. Here the comment occurs to one that this is not very logical, and, indeed, the whole amount to be paid under s. 8 of the Act is based on very artificial rules which do not always work with exact justice.

I wish to note that in line 1 of sub-s. 2 the words "the lump sum" refer to the whole amount of "A," although it may be ascertained under sub-s. 2. In line 2 of cl. (i.) of sub-s. 2 the words "the lump sum" do not necessarily have the same meaning, because there the draftsman is only considering a stage in the ascertainment of what is ultimately going to be "A," the lump sum. It is not very well drawn, because it does not say what it obviously intends to say, that the lump sum, subject to the operation of certain clauses which are going to follow, shall be a sum equal to the earnings of the workman during the three years preceding the injury or the sum of 200*l*., but not exceeding in any case 300*l*. "A" is not that sum, because the provisions of clause (iii) have still to be applied. Cl. (iii.) contains the same kind of inaccuracy, in the use of the words "lump sum" without any qualification, because it is found, as has been pointed out, that there is to be deducted "from the sum as above calculated," which is quite accurate, "the amount of weekly payments (if any) made to the workman before his death so, however, as not to reduce the lump sum below two hundred pounds." The words "lump sum" there, again, are being applied as a step in the process of calculation, which is ultimately going to ascertain the value of the symbol "A." That is plain, because there may still have to be deducted from the lump sum, although the draftsman says it is not to be reduced below 200*l*., the amount of the redemption moneys to which I have referred.

When one comes to the amount of the children's allowance, which I can describe under the symbol "B," no deduction is made for weekly payments made to the workman before his death. That is definitely stated in cl. (iii.) of sub-s. 3. Here a difficulty might have been foreseen, I think, by the draftsman, because he has provided, in precise words, that "A" plus "B" cannot exceed 600*l*., but without noting that sums might have been paid to the workman before his death

—indeed, large sums—with the result that the total amount payable to the workman might largely exceed 600*l.* on a certain construction of the section. I would add that the final words in cl. (iii.) of sub-s. 3 point out that certain redemption sums, with which I am going to deal in a minute, or certain parts of the redemption sums, are to be deducted in a certain event before " B " can be ascertained.

One aspect of the question which arose in *Malcolm* v. *Barber, Walker & Co.* (1) was whether in any event it was possible under s. 8 of the Act for the amount payable by an employer to exceed the sum of 600*l.* It would take some little time to go through the case and show what the Court of Appeal, consisting of the Master of the Rolls and Scrutton and Sargant L.JJ., actually decided, but for the present purpose all I want to say is that the question was one, as all the members of the tribunal agreed, of considerable difficulty on the language of the section. They came to the conclusion at which they arrived by a consideration of all the words of the section and of the most probable intention of the Legislature. It was determined that the total amount paid and payable by an employer might exceed, in a particular case, in the aggregate 600*l.* notwithstanding the language used in sub-s. 1 of s. 8.

Having said that, I come to the crucial question; it turns upon the final language of cl. (iii.) of sub-s. 3, which refers to the ascertainment of what I call " B " The clause begins with the statement that no deduction is to be made from " B," as I call it, in respect of the amount of weekly payments made to the workman in respect of the same injury. Then follow the words: " but if such weekly payments have been redeemed the amount paid in redemption thereof, if and so far as it exceeds the lump sum payable, shall be deducted from the amount of the children's allowance as ascertained under the foregoing rules." Accordingly, in ascertaining " B " something must be deducted if such weekly payments have been redeemed —namely, the amount of the redemption money if and so far as it exceeds the lump sum payable. If the words " the lump

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sum payable" are construed as meaning "A"; in other words, if "the lump sum payable" means the same amount that is mentioned in line 1 of sub-s. 2, one gets, as my brother Romer has pointed out, the most astonishing results.

Let me give an example in my own words. First, let it be supposed that the lump sum mentioned in s. 8, sub-s. 2 (iii.)—that is, in the words "so, however, as not to reduce the lump sum below two hundred pounds'—is the 200*l.* maximum, and suppose that the redemption sum is 750*l.*; then the lump sum mentioned in the first line of sub-s. 2 is obviously nothing, and "A," therefore, is nought. Let it be supposed that the amount of the children's allowance, prima facie, before the deduction of anything in respect of redemption money, is 700*l.*; then is the whole of the 750*l.*, which is the redemption sum, deducted from the 700*l.*, so that the total payment is nought? Then let it be assumed that the redemption sum is only 200*l.* If so, once again "A," properly ascertained, is nothing, because the 200*l.* is deducted from the 200*l.* maximum; but, when with regard to "B," can the whole of the redemption money be deducted? If so, the payment to the dependants under s. 8 will depend, without logical reason, on the date at which the redemption takes place. If the redemption takes place at an early date so that there are very small amounts of weekly payments deducted, one result follows. If the redemption takes place at a late date so that the amount of redemption money is small, "B" will be very much larger than before. What is, in my opinion, more astonishing as a result is this, that, if cl. (iii.) of sub-s. 3 is construed as meaning that 200*l.*, part of the redemption amount, is to be deducted, from "A" and is also, together with another amount, to be deducted from "B," say 700*l.*, then altogether 900*l.* has been deducted in respect of the payments to the workman of, say, 750*l.* In that case the 200*l.* is deducted twice over.

I decline to believe that that can have been the intention of the Legislature. In my view, the lump sum payable in cl. (iii.) of sub-s. 3 must be construed as having the same meaning as the words "the lump sum" have under sub-s. 2 (iii.)

—that is to say, the lump sum ascertained before the qualification—and the proviso in that sub-section is applicable only to the deduction of redemption moneys if the weekly payments have been redeemed. In effect, therefore, the final words in cl. (iii.) of sub-s. 3, in reference to the ascertainment of what I call " B," must be taken to mean that, if in the ascertainment of " A " under the provision or qualification in cl. (iii.) of sub-s. 2, the employer has not been able to get the full benefit of the redemption payment because there has been an excess which he is not able to deduct in ascertaining " A," then he is to be entitled to deduct the undeducted excess in ascertaining what I call " B." That seems to have been the view adopted by Sargant L.J. in *Malcolm* v. *Barber, Walker & Co.* (1) as pointed out in the judgments which have been delivered.

I am glad in this connection to apply the apposite passage from Maxwell on the Interpretation of Statutes, 7th ed., p. 217, cited by Romer L.J.

In the result, I agree with the judgment proposed by the Master of the Rolls.

Appeal allowed.

Solicitors: *Pattinson & Brewer; Davies, Arnold & Co.*

(1) 20 B. W. C. C. 526.

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April 5.

DEEN *v.* DAVIES.

Negligence—Animals mansuetae naturae—Horse stabled near Highway—Straying into Highway—Scienter, Absence of—Injury to person using Highway.

No duty is cast upon the owner of an animal mansuetae naturae, which is being depastured on land adjoining the highway, to prevent it from straying on the highway, unless it is known to be of vicious habit. But a person who brings an animal on the highway must take reasonable care to prevent it from doing damage to other persons thereon. What constitutes reasonable care is a question of fact in each case, and the standard of reasonable care may not be the same in the country as in a town. In this respect the duty to the public is the same in the case of one who leaves an animal in the street, and of one who places it in a stable or yard adjoining the street without taking proper steps to prevent it from straying into the street, where it would naturally go. In either case the owner is liable for the conduct of the animal if he puts it in a position in which it is likely to cause damage to persons lawfully using the highway.

APPEAL from the Merthyr Tydfil County Court.

The facts of the case were as follows: The defendant was a farmer whose farm was two miles distant from Merthyr Tydfil, in the county of Glamorgan. From time to time he was wont to ride his pony, which was aged eight years, into the town for the purpose of business. According to the finding of the county court judge, the pony was a quiet and normal animal. The defendant was in the habit of stabling the pony during the time that he was in Merthyr Tydfil with one Collins, and on May 31, 1934, he rode her into the town as usual and left her at Collins' stable. He did not tie her to the staple provided for the purpose in the stall, but to a wooden bar in the stall, which he believed to be firm. This was about midday, and at some time between midday and 2 P.M. the pony pulled away the wooden bar to which she was tethered, and with this attached to the halter round her neck escaped into the street. There was no evidence that the pony bolted, but only that she was trotting homewards. The pony was unattended, and neither the defendant nor Collins were aware that she had broken the wooden bar from the stable. The plaintiff, an invalid, was proceeding along the street slowly upon crutches when the pony ran across the road from the stable door and either knocked her down or caused her to fall and injured her. At 2 P.M., when the defendant returned to the stable, the pony was tied up in the stall, and it was not until afterwards that he heard of the accident.

The findings of the county court judge were as follows: (1.) that the pony caused the plaintiff, who was stepping from the pavement to the road, to fall, and that serious damage resulted to her. The evidence did not establish that the plaintiff was knocked down by the pony or by the piece of wood attached to it, but he was satisfied that the conduct of the pony caused the plaintiff to fall, without any negligence or lack of care on the plaintiff's part; (2.) that this was in consequence of the escape of the pony unattended on to the road from the stable where the defendant had brought and tied her up; (3.) that the conduct of the pony was what was to be expected from a pony such as this, and that, if not securely tied in the stable, it was likely to escape and do mischief to persons (especially children or persons unable to avoid a quick-moving animal) using the road as pedestrians; (4.) that the pony did not exhibit any dangerous or savage propensities, but behaved in a way which was normal to an ordinary pony unattended on the roadway in a town, and that this behaviour caused the plaintiff to fall and injure herself; (5.) that the defendant was guilty of negligence in omitting to tie up the pony properly in the stall where he had placed her, and that, but for such negligence, the pony would not have been in a position to cause the plaintiff to fall and suffer damage: that the pony got on the road unattended owing to the negligence of the defendant and that the damage was the result of this negligence.

On these facts the county court judge gave judgment for the plaintiff and assessed the damages at 150*l.*

He held also that in law and upon the authorities the defendant was not entitled to avoid liability.

The defendant appealed on the ground that the judge was wrong in law, that there was no evidence of negligence on the part of the defendant, and that the damage suffered by the plaintiff was too remote.

Joshua Davies for the appellant (defendant). The defendant is not liable for negligence on the facts here, for he was under no legal duty. He is only liable for the natural and probable consequences of negligence or trespass, and in the absence of proof of " scienter " as to the habits of the pony or of vicious propensity he is entitled to judgment. His position is the same as that of an owner whose horse is pastured in a field and escapes through a gap in a fence or hedge into the highway: *Jones* v. *Lee.* (1) There is no duty in that case on the owner or occupier to keep his animals off the highway: *Cox* v. *Burbidge* (2) and *Heath's Garage, Ld.* v. *Hodges.* (3) The defendant may be presumed to have known that the pony if loose would go home, but there is no evidence that he knew that it would do anything dangerous. In the absence of such evidence the owner of an animal mansuetae naturae is entitled to assume that the animal is harmless: *Manton* v. *Brocklebank.* (4) In the case of damage by domestic animals the owner is not presumed to be liable for their timidity or stupidity: *Ellis* v. *Banyard.* (5) In *Gayler & Pope, Ld.* v. *B. Davies & Son, Ld.* (6), the bolting of a horse was held by McCardie J. to be prima facie evidence of negligence on the part of the owner, but there was no such failure of duty by the defendant here, and in so far as that decision is against me it is not binding on this Court. In *Hadwell* v. *Righton* (7) the owner of a fowl which strayed on the highway was held not liable, as the damage was not the natural consequence of its presence there.

[He cited also *Fardon* v. *Harcourt-Rivington* (8) and *Sycamore* v. *Ley.* (9)]

The county court judge has found here that the evidence

(1) (1911) 106 L. T. 123.
(2) (1863) 13 C. B. (N. S.) 430.
(3) [1916] 2 K. B. 370.
(4) [1923] 2 K. B. 212.
(5) (1911) 106 L. T. 51.
(6) [1924] 2 K. B. 75.
(7) [1907] 2 K. B. 345.
(8) [1932] 146 L. T. 391.
(9) [1932] 147 L. T. 342.

did not establish that the plaintiff was knocked down by the pony, and her fall may have been due to an unexpected danger; there is no evidence of negligence on the part of the defendant. If there is evidence of negligence on the part of the defendant the damage is not the natural consequence of it and is too remote to enable the plaintiff to recover.

W. S. Morrison K.C. and *Derek Parsons* for the respondent (plaintiff). The judgment of the county court judge was right in law and the evidence amply justified him in his findings of fact. The deciding element in *Jones* v. *Lee* (1) was the question as to the liability of an occupier of land whose animals escape from pasture owing to deficient fencing or an open gate. The owner or occupier is under no liability to fence and therefore in those cases there is no negligence, but that principle does not apply here. In *Heath's Garage, Ld.* v. *Hodges* (2) Neville J. points out the origin of the principle. Before the existence of roads our ancestors depastured their cattle over field and commons, and when roads came to be made and were dedicated to the public, the dedication was subject to this well known risk of cattle straying upon them. The present case is a conflict of right between two members of the public, and the defendant has not the immunity which the occupier enjoyed in *Jones* v. *Lee.* (1)

The whole circumstances must be looked at in each case, and here the negligent tethering of the pony near to the highway constituted a novus actus interveniens. Persons bringing animals on to the highway must prevent them from doing damage, even if they are not vicious by nature: *Haynes* v. *Harwood.* (3) In the latter case the Court could not decide the matter upon a presumption of law and upon the authorities, so that it became necessary to consider whether on the facts there was absence of reasonable care in superintending the horse. The immunity which extended to an occupier of land adjoining the highway does not extend to owners generally, who allow their animals to stray upon the highway. Here the county court judge has found upon the facts that the defendant was negligent and that damage done to the plaintiff was the reasonable and probable result of this negligence, and his judgment should stand.

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(1) (1911) 106 L. T. 123.
(2) [1916] 2 K. B. 370.
(3) [1935] 1 K. B. 146, 153.

Joshua Davies in reply. *Haynes* v. *Harwood* (1) is in the same category as *Gayler & Pope, Ld.* v. *B. Davies & Son, Ld.* (2) Those are cases of a horse and cart left in the road unattended, in which the absence of control is the material factor. This case is on all fours with *Heath's Garage, Ld.* v. *Hodges.* (3) The pony here was not a dangerous animal, and no scienter was proved. That being so, the defendant was under no duty to the public and there is no actionable negligence: *Manton* v. *Brocklebank.* (4)

SLESSER L.J. [after stating the facts, referred to the evidence and to the findings of the county court judge, and continued:] There is here a finding by the learned county court judge, in my opinion supported by evidence, that this lady fell and sustained her injuries by reason of the conduct of the pony; and if the fact that the pony passed this lady so near and caused her so to fall was the result of a failure of duty on the part of the defendant, then the learned judge was entitled to find that that failure of duty was the cause of this lady's damage. Therefore in this case we have not to consider whether the fact of the pony escaping was or was not sufficiently the cause of the lady's damage, but rather the more difficult point whether there was any duty in the circumstances on Mr. Davies at all, which he may be said to have failed to perform, so as to render him liable to an action for negligence.

The authorities establish that there may be circumstances—I do not say there always are, I think it is a question of fact—in which it is negligent to allow a horse or a horse and cart to be unattended in a highway. As Greer L.J. has said recently in *Haynes* v. *Harwood* (5): "Of course it does not follow that in all circumstances it is negligence to leave

(1) [1935] 1 K. B. 146, 153.
(2) [1924] 2 K. B. 75.
(3) [1916] 2 K. B. 370.
(4) [1923] 2 K. B. 212.
(5) [1935] 1 K. B. 146, 153.

horses unattended in a highway; each case with all its circumstances has to be considered." Then he mentions matters which may be the proper subject of consideration, whether it is a crowded street in which many people, including children, were likely to be about, and so on. That decision appears to me to be in harmony with a decision of the late McCardie J. in *Gayler & Pope* v. *B. Davies & Son, Ld.* (1), where he says that for his own part he is of opinion that to leave a horse unattended or a horse and cart may constitute negligence, and that he finds authority in *Tolhausen* v. *Davies* (2) to that effect, as decided in this Court. *Tolhausen's* case was a decision of a Divisional Court, and it was a case of a runaway horse and cart in a highway. In the judgment of Smith J., as he then was, in that case, he says: "I held in the case of *Watson* v. *Weekes* (3), on March 19, 1887, in which I was affirmed by the Court of Appeal on April 1, 1887, that upon proof given by a plaintiff that the defendant's horse, harnessed to a cart, was running away unattended along a highway, whereby the plaintiff, being lawfully thereon, was injured, a judge could not rightly non-suit, for that such facts were more consistent with the absence of ordinary care in the superintending the horse than such care having been used." In the present case, this appeal being entirely on a question of law, if the judge could not non-suit, it became a question of fact for the jury whether there was or was not sufficient evidence of negligence in the particular case. I may also refer to a Scottish decision to the same effect, *Snee* v. *Durkie* (4), which holds that where a runaway horse and carriage runs down a person in broad daylight in a public street the presumption is that the owner of the horse and carriage is in fault.

In these circumstances Mr. Davies says that even if he were not disposed to dispute this as a general proposition, a distinction can be drawn in the present case by reason of the fact that, although this horse became unattended when it was in the public street, it only came to be in that

(1) [1924] 2 K. B. 75, 87.
(2) (1888) 57 L. J. (Q. B.) 392, 394.
(3) Unreported.
(4) (1903) 6 F. 42.

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position because it broke away from a piece of wooden structure to which it was attached in a stable which was not upon the highway. He cites to us a number of authorities, some of which are easier to understand than others, but which are to this general effect, that the owner or occupier, and I think also a person who is a licensee, who is entitled to pasture, to place horses, cattle, sheep, fowls or any other tame animal upon a field, is not responsible if by reason of the absence of hedges those animals get upon the highway. That is a general proposition, and I do not think that that proposition thus generally stated can be disputed. It is pointed out in the cases, without need to go into them in detail, that in early days the majority of roads had in fact no hedges at the side of them at all, and there is no obligation in law on persons to hedge their fields, to keep animals from straying. But there does appear very clearly at least one exception to that general rule; that is that in the case where the animal is known to be of a vicious propensity, known to be a danger, then the general doctrine as contained in *Chasemore* v. *Richards* (1) and the other authorities, that you detain a dangerous thing in a particular place at your peril, applies, and you cannot take advantage of the privilege of not being bound to fence or hedge your property. But Mr. Davies is quite right in saying that this is not such a case, that there is no suggestion that this animal is of a dangerous or vicious propensity and it is not necessary to consider that class of case. But it is also equally clear from the authorities, that there may be circumstances in a particular case which may make a person liable for negligence, that is, may put a particular duty upon him. Irrespective of the general duty to control on your property what is dangerous, there may arise from the nature of the circumstances of a particular case a particular duty. Lord Atkin makes the distinction very clear in *Fardon* v. *Harcourt-Rivington* (2), where he says this: "In the first place he"—that is Mr. O'Connor—"relied upon the liability of the owner of an animal of known mischievous propensities to keep it under control, with the consequence that damage caused by the mischievous propensities is damage which falls upon the person who fails to exercise the control. That is a liability which exists only in the case either of wild animals, which have by their nature a mischievous propensity, or of tame animals which are known to the persons having control to have a particular mischievous propensity." He goes on: "But it is also true that, quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour—the ordinary duty to take care in the cases put upon negligence." Speaking of dogs, Greer L.J. in *Sycamore* v. *Ley* (1) speaks first of the dog which is not tame, and he says that the liability there to keep him under control is absolute, like the liability of the defendant in *Rylands* v. *Fletcher*. (2) Then he goes on: "But that is not the end of his liability. He may, in my judgment, be liable for the conduct of a dog which has not been taken out of the category of tame animals if he puts it in such a position and in such circumstances as render it likely that the dog will get excited, will lose its temper, and will cause damage to people lawfully passing along the highway."

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(1) (1859) 7 H. L. C. 349.
(2) (1932) 146 L. T. 391, 392; 47 Times L. R. 25.

In my judgment, in the facts of this case and having regard to all the circumstances, the defendant did so put his pony in such a place that if it were not properly tethered it was likely to cause damage to persons who were upon the highway. The learned judge has found as a fact that he ought to have tied the pony to the staple, and there was ample evidence for that finding. He says this: "The defendant Davies was guilty of negligence in omitting to tie up the pony properly in the stall where he had placed it." [The learned Lord Justice referred to the evidence in the county court, and continued:] That means that if he had the duty not to place this pony in such a position and deal with it in such circumstances that it would be a danger, he failed to satisfy that duty just as much as if he had not tied up this pony at all, but had left it loose in the stable. Are the circumstances of this case so peculiar and so particular that in this case, whatever may be the general immunity of persons in regard to horses that break out of their fields, it can be said that no liability exists? I think not. I think, first of all, that in so far as if a horse is allowed unattended on a highway in a town it may prove a danger to persons, it is the duty of a person bringing that horse into the town and stabling it there temporarily for his convenience to see that it is properly tethered. He must have regard to the fact that the horse will naturally tend to stray. But there is in this case in addition an express finding on the evidence that this particular pony would tend, if it were loose, to stray home. The learned judge says this: "I think it is clear that there is nothing in the cases which enables the owner of the pony to say that he is under no liability if his pony escapes unattended from a stable in the town and knocks down a person in the street or causes her to fall when he trots away in the enjoyment of his freedom to give effect to a natural desire to return home." The evidence in the case is that it was anticipated by the defendant that this animal would return home if it were not securely tethered; indeed, the object of tethering this animal was the very purpose of preventing it returning home and necessarily returning home through the streets, where he might be a danger to persons. No doubt, equally, he had the motive that he did not want to lose his horse, although that motive cannot have weighed quite so seriously with him in this sense, that when he got home he would have found his horse, but he would have had to walk home and would not have had the amenity of riding upon the horse's back. Whatever his motives may have been, he tethered this animal (on the evidence) anticipating all the risks and the dangers which might arise if the animal were not tethered; he tethered it for the express purpose, as I see it, of preventing it doing the very sort of thing which in this case it did. It is impossible, on the facts of this case, to say that he did

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(1) 147 L. T. 342, 345.

(2) (1868) L. R. 3 H. L. 330.

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not anticipate all the dangers; and he failed to guard against the dangers which persons in the street might run by this horse not having been securely tethered.

Finally, I would refer to *Turner* v. *Coates* (1), which is an illustration of what I was saying, that, notwithstanding that there is a right normally to bring a horse upon a highway, there may be particular circumstances which render such an act negligent. In *Turner* v. *Coates* (1) the headnote says this: " A young unbroken colt belonging to the defendant, a farmer, was being taken along a highway on a dark night. It was allowed to go loose behind a mare which was being led and in front of a trap driven by the defendant. The plaintiff, who was riding a bicycle, was coming from the opposite direction when the colt, being startled by the light on the bicycle, suddenly ran across the road and collided with and injured the plaintiff." On that it was found: " That it was well known, especially to a farmer, that a young unbroken colt when loose on the highway is apt, when startled, to rush about and to kick, and that there is grave risk of danger to the public in allowing such a colt to go loose on the highway in the dark"; and it was held by the county court judge that the defendant was guilty of negligence in allowing the colt to be on the highway in the dark without being under proper control. That case was appealed to the Divisional Court, and the Divisional Court upheld the decision of the county court judge. Lush J., referring to what Lord Cozens-Hardy M.R. had said in *Heath's Garage, Ld.* v. *Hodges* (2), says this: " The Master of the Rolls implies, therefore, that if an animal, having regard to its natural propensities under such circumstances as those with which we are dealing, is likely to come into collision with a person on a bicycle or with a motor car, what he was saying will not apply." What Lord Cozens-Hardy M.R. had said in *Heath's Garage, Ld.* v. *Hodges* was this: " I am prepared to hold that in ordinary circumstances, in an ordinary highway, it is no breach of duty not to prevent harmless animals like sheep from straying on to the highway, and that it makes no difference whether the action is sought

(1) [1917] 1 K. B. 670, 674. (2) [1916] 2 K. B. 370, 376.

to be based on negligence or on a nuisance to the highway." Lush J. comes to the conclusion that this case of the colt in the dark behind the mare is one of those exceptional cases where the circumstances are such that there is specifically a duty cast upon the person responsible for the care of the colt to take care, and that for a failure of that duty they may be negligent, notwithstanding the more general right to take animals unrestrained upon the highway. Bailhache J. comes to the same conclusion and quotes an important passage from the judgment of Bray J. in *Hadwell* v. *Righton* (1): " In the absence of anticipated danger, there is no room for the suggestion of negligence."

I think that there was here danger which either was or ought reasonably to have been anticipated—namely, the danger that if this animal got loose, through improper tethering, from this stable it would proceed to try to go home, that it would pass along the highway and, being unattended upon the highway, would be liable to cause damage to persons on the highway who came in contact with it or came thereto. For these reasons, I am of opinion that this appeals fails.

ROMER L.J. I have arrived at the same conclusion. Counsel for the appellant, in the course of his interesting argument, properly called our attention to a series of cases in which the Courts had to deal with the position of the owner of an animal that escapes from land adjoining a highway on to the highway and there injures somebody who is lawfully using the highway. In reading the judgments in these cases it is essential to distinguish between those parts where the Court is dealing with the question of what duty is owed to the public by the owner of an animal which is in a field, say, adjoining the highway and those where it is dealing with the question whether, if he does owe a duty not to let the animal escape on to the highway, the damage sustained by the plaintiff is the natural consequence of his breach of that duty. An interesting illustration of that

(1) [1907] 2 K. B. 345, 349.

is to be found in *Cox* v. *Burbidge*. (1) In that case the owner of a horse that had no vicious propensities escaped from a field adjoining a highway on to the highway by reason of the fact that there were gaps in the hedge separating the field from the road. Having got on to the road, it damaged the plaintiff in the action by kicking him. The decision, which was in fact in favour of the defendant, could have been supported on either of two grounds: either because, the horse having no vicious propensity, there was no duty on the part of the defendant to prevent him getting on the highway, or because, if there was a duty to prevent the horse from getting on to the highway, the damage done to the plaintiff was not the necessary or probable cause of that breach of duty, because it was not the habit of that horse to kick. ✓ The result would have been a little strange if the Court had arrived at the conclusion that the owner of an animal that is in a field adjoining a highway owes a duty to the public to prevent it getting on to the highway, because if the plaintiff had then been damaged merely by the horse trotting along the highway in the natural manner the defendant would have been liable, but if the plaintiff had been damaged by reason of the horse kicking him, which was an unnatural act on the part of the animal, the defendant would not have been liable.✓ However, the Court decided in favour of the defendant on both grounds: first of all, on the ground that the defendant owed no duty to the plaintiff to prevent his horse getting on to the highway because he did not know the horse was of a vicious character, if indeed the horse was of a vicious nature; secondly, that supposing there was such a duty, yet, inasmuch as the plaintiff had been damaged by the horse behaving not in a natural manner, but in a way which the defendant could not reasonably have expected it to do, the damage was too remote. But, bearing that distinction in mind, I think it emerges clearly from those authorities to which our attention was called that the owner of an animal that is being depastured on land adjoining or near a highway owes no duty to the public to prevent

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(1) 13 C. B. (N. S.) 430.

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that animal straying on to the highway—and that whether he does or does not know that it is a natural tendency of an animal to get on the highway from the field if it can. I say that because I observe that Erle C.J., in *Cox* v. *Burbidge* (1), said this in dealing with this question of duty of the owner of such an animal: "The owner of a horse must be taken to know that the animal will stray if not properly secured." I should think it is common knowledge that sheep will get out of a field if they can, if there is a gap in the hedge, and if one gets out the whole lot will come out; that if chickens can get on to a highway to dust themselves they will do so. But neither the owner of a chicken which is feeding near the highway nor the owner of a sheep which is being depastured near a highway owes any duty to the public to prevent the chicken or the sheep from getting on to the highway, unless, of course, he knows that the chicken or the sheep—or, in the case of a horse, the horse—is of a vicious propensity and is likely to damage his Majesty's lieges.

If, therefore, the defendant in this case had turned his horse into a field while he was pursuing his lawful occupation in the town, and the horse had escaped on to the highway through a gap in the hedge or through an open gate, and had damaged the plaintiff, the defendant would not, in my opinion, have been liable.

But there is another series of cases to which our attention was called, again very properly, by Mr. Davies. Those were cases in which the Court had to deal with the position of the owner of an animal which he himself has brought upon the highway and which, having been so brought, damages somebody else who is lawfully using the highway. Again, on examining those cases, it is very necessary to draw a distinction between two different matters. There is, first of all, the question whether the owner of such an animal owes any duty at all to the public; and, secondly, there is the question of whether, if he does owe such a duty, he has committed a breach of it; because, if he does owe a duty to take all reasonable care that the animal he has brought on to the highway does not damage other parties, reasonable care in one case may not be reasonable care in another. Therefore, in some cases where a man has so brought an animal on to the highway he has been held liable for damage caused to another party, and in other cases he has not been held liable. As I read those cases, bearing that distinction again in mind, it has been clearly established that the owner of an animal who brings it on to the highway does owe a duty to those who are using the highway to use all reasonable care to prevent the animal damaging other parties. Reasonable care in the country may not be reasonable care in the town: reasonable care in the case of one animal may not be reasonable care in the case of another. In one of the cases to which Slesser L.J. has referred, the owner of a colt, which he had tethered behind a cart or which was following a cart, which colt was of an excitable disposition (as most untamed colts are), was held liable for the damage done to a person using the highway by the colt suddenly swerving to one side; and it was held that, having regard to the nature of the animal, he had not taken all reasonable care to prevent the animal from damaging somebody else. In these cases the general principle is established, that the owner of an animal which he brings on to the highway must use all reasonable care to prevent the animal doing damage.

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(1) 13 C. B. (N. S.) 430, 437.

In the present case the difficulty is to ascertain within which of those two principles the defendant in this case is brought. In my opinion he is brought within the second principle. He had brought his horse upon the highway and he rode it into a town. While he was riding it into the town he owed a duty to take all reasonable care to prevent the horse doing damage to other persons. If he had tethered it in the street he would have owed a duty to take all reasonable care to see that the horse was so securely tethered and tethered in such a place that it could not do damage to other people. What he did, as has been pointed out by Slesser L.J., was to put it into a stable the door of which opened on the street, and was in fact open at the time the horse eventually escaped from the stable into the street; and the

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horse was tethered not to the staple (which was apparently used by the owner of the stable for tethering horses) but to a bit of wood which was nailed—as the defendant thought securely—against the side of the stable. In my opinion the defendant's duty had not ceased when he so tethered his horse. It is not necessary to say whether in general the first principle to which I have referred extends to a thing like a stable opening on to the road of a town. Speaking for myself, I doubt very much whether it does. I do not know that any one really knows the origin of the principle which excuses the owner of an animal depasturing near a highway from the duty of seeing that it does not get on to the road; but it probably was that which, I think, lies at the bottom of the judgment of Neville J. in *Heath's Garage, Ld.* v. *Hodges* (1), that in days long before country roads existed it was the habit of our ancestors to depasture their cattle all over the place, and when the road was subsequently dedicated to the public by the owner of the land the dedication was made subject to this well known habit. If that is so, it is difficult to imagine that when a highway through a town was dedicated it was dedicated subject to any right or known habit on the part of the public to let their domestic animals roam over the road between the houses of the town.

However that may be, this case can be decided on its particular facts; in my opinion, in the particular facts of this case, the defendant had not discharged the duty that he owed to the public, a duty which began when he took his horse on to the highway and rode it along the street, and had not come to an end when he tethered it in this stable.

There are only two other questions that remain. The first is this: Was the defendant negligent, that is to say, did he fail to take all reasonable care to prevent his horse getting on to the highway? As to that, I confess that, so far as I can judge on the evidence that was given, I should not have arrived at the same conclusion as the learned county court judge. Nevertheless, it seems to me impossible to say that there was no evidence upon which he could arrive at the conclusion that the defendant had been negligent.

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(1) [1916] 2 K. B. 370.

The only other question is whether the damage sustained by the plaintiff was too remote to enable her to recover. If this unfortunate crippled lady had been damaged by reason of the pony doing something which could not reasonably have been expected of such a well-behaved pony then the defendant would be entitled to escape; but the learned county court judge has found (and as far as I can see he was justified in finding) that this pony was behaving in a way which was normal in an ordinary pony unattended on the roadway in a town, and that it was by reason of that behaviour that the plaintiff was injured. That being so, it seems to me impossible to say that the damage was too remote. ✓

Therefore, while feeling sympathy for the defendant, I think that this appeal fails.

SINGLETON J. [after reading the findings of fact by the county court judge, continued:] In the course of the case evidence was called on both sides as to what a pony of this character might be expected to do if it was placed in a strange stable, not safely fastened in that stable, and if it became hungry and desired to go to its home. That evidence, we were told, was given on a suggestion of the learned county court judge, who no doubt had considered *Turner* v. *Coates* (1), to which both the learned Lords Justices have referred to-day. In that case Lush J. said: " I see no objection to evidence being given that under certain circumstances a particular animal exhibits habits which are dangerous to mankind." In this case evidence was given by a witness on each side as to what ponies would do generally, and also evidence was given by the defendant of what one might expect this pony to do. I observe that in the judgment of Lush J. to which reference has already been made, Lush J. said: " Therefore, without taking reasonable care, the defendant turned on to the highway an animal likely to cause damage, not by doing something mischievous, but by doing exactly what under

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(1) [1917] 1 K. B. 670.

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the circumstances this colt was likely to do." It seems to me that, among a large number of authorities which have been cited to us, that is nearest to the circumstances generally of this case. I do not think that those authorities (accepting, as I do completely, the principle with regard to the escape of a horse or sheep or a chicken or a pig, or any other animal of a tame or domestic nature, from a field on to a highway because of fences being defective) meet the circumstances of this case. Greer L.J. pointed out recently—indeed it has been pointed out many times—that every case depends upon its own circumstances, and in order to ascertain whether or not in the particular circumstances the defendant has been negligent or not one must, in the first place, ask oneself what is the duty which he owed, in order to ascertain whether or not there had been any breach of that duty. The learned county court judge, in the course of his judgment, after stating the facts, said: "I have considered the authorities cited to me and many others, including *Gayler & Pope, Ld.* v. *B. Davies & Son, Ld.* (1), and cases of that type, and, although the authorities are not very clear, there is nothing in them which enables the owner of the pony to say that he is under no liability, if his pony escapes unattended from a stable in a town, and knocks down a person in a street or causes her to fall, when he trots away in the enjoyment of his own freedom to give effect to a natural desire to return home." It seems to me one must bear in mind that this pony was taken from the country into a town; that it was thought right by its owner to place it in a stable both for its own protection and the protection of the public; that he placed it in a stable hoping, no doubt, that it would be safe; that he did not take care to see that the place to which he tied it was safe: that the pony thereafter did that which he ought to have anticipated, and which every one who knew anything about ponies or horses ought to have anticipated that a pony would do—namely, when it was tired of being in the place or when it became hungry, it would pull at its manger and, if the piece of wood gave, walk

(1) [1924] 2 K. B. 75.

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out; and if then it walked directly from the doorway through the yard and into the street the natural thing is, I suppose, for it to increase its speed as it gets into a more crowded part of the town. The circumstances are quite different from the facts and circumstances in most of the authorities which have been cited to us. Merthyr Tydfil is a large and busy town; it has some 80,000 inhabitants. I cannot think that one who takes into the middle of that town a pony from the country and leaves it in such a position that it is both able and likely to get on to the road—from the very habits of that pony and that class of animal—is fulfilling his duty to the public. I agree with the Lords Justices that if a defendant in such circumstances takes into the middle of a town a pony or a horse, he does not discharge his duty by placing that animal in a stable without securing it satisfactorily. Mr. Joshua Davies, who argued this case very fully, agreed that if it had been left in the highway and then had caused damage of the kind which should be anticipated from its nature there would be liability on the defendant. For myself, I fail to appreciate that there is a distinction between the case of a man who leaves a pony of that kind in a street and the man who places it off the street in a stable or in a yard without any security or without taking steps to prevent it getting on to the highway, to which it would naturally go, according to the evidence which was given. Each case must depend upon its own circumstances.

I agree entirely with the judgment of the learned county court judge and with the Lords Justices who have already delivered judgment, and I think that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Beamish, Hanson, Airy & Co., for Taliesin Griffiths & Son, Merthyr Tydfil.*

Solicitors for respondent: *N. F. Becher Bingham* for *John Vaughan & Son, Merthyr Tydfil.*

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[1933. H. 548.]

Landlord and Tenant—Joint tenants—Bankruptcy of one tenant—Proof for arrears of rent—Proof admitted—No dividend paid—Distress against goods of joint tenant for arrears of rent including sum provep for—No Excessive Distress.

A landlord who has proved in the bankruptcy of one of two joint tenants of premises for arrears of rent is entitled to levy a distress on goods of the other tenant on the premises for the same arrears, at any rate so long as no dividend has been paid to him in the bankruptcy.

Ex parte Grove (1747) 1 Atk. 104 explained and distinguished.

Ex parte Honey, In re Jeffery (1871) L. R. 7 Ch. 178 applied.

Semble that a distress can properly be levied on the tenant's own goods for arrears of rent already proved for in his bankruptcy, so long as no dividend has been received by the landlord in the bankruptcy. It is not until a dividend is being paid that the landlord is put to his election between the two remedies.

So *held* by the Court of Appeal (Lord Hanworth M.R., Roche L.J. and Swift J.), reversing the decision of Talbot J. sitting with a common jury.

APPEAL from Talbot J. and a common jury.

On May 17, 1926, James Watt let 52 Eltham Road, Lee, S.E., to the plaintiff, Charles Robert Holmes and his wife Mary D. Holmes, as joint tenants for the term of three years at a rent of 4*l*. 10*s*. a week and thereafter from week to week, but so that the tenancy should then be determinable only on three months' notice in writing. On May 4, 1932, James Watt died and probate was taken out to his estate by the defendants as his executors. On May 23, 1932, a receiving order was made against the plaintiff, and on July 4 a notice was given disclaiming the tenancy as from July 19. The two tenants continued, however, to occupy the premises. On July 18 a proof was carried in in the plaintiff's bankruptcy for the sum of 67*l*. in respect of rent said to have accrued due and to remain unpaid on the date of the receiving order. The proof was admitted, but no dividend was ever paid in respect of it for want of assets. On August 11 the defendants took out a distress warrant for the sum of 78*l*. 3*s*. 11*d*. against the furniture on the premises, which was said to belong to

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Mrs. Holmes. An entry was made under the distress, but on August 15 the plaintiff paid the bailiff 30*l.* on account, with a request to him to withdraw from possession, but with liberty to make a second distress for the rent and expenses. The plaintiff's wife died on the same day, and he remained in possession of the premises and furniture. On December 3 the plaintiff paid a further sum of 43*l.* 2*s.* 3*d.* on account of rent, making with the previous payment of 30*l.* a total of 73*l.* 2*s.* 3*d.*; but further rent having meanwhile become due the defendants on the same day took out a distress warrant for 77*l.* 1*s.* 8*d.* The first distress of 78*l.* 3*s.* 11*d.* included the sum of 67*l.* proved for in the plaintiff's bankruptcy, and the second distress included 59*l.* 1*s.* 8*d.* out of this sum of 67*l.* The plaintiff claimed that the defendants were not entitled to distrain for any part of the sum proved for, and accordingly that both the distresses were excessive. He therefore claimed damages for these excessive distresses.

The jury fixed the damages to the plaintiff at 20*l.*, and Talbot J. gave judgment accordingly on the ground of the excessive distresses.

The defendants appealed. The appeal was heard on April 10 and 11, 1935.

Cave K.C. and *R. J. White* for the appellants. There is no ground for saying that there has been an excessive distress. The fact that the landlords proved in the husband's bankruptcy on July 18, 1932, for 67*l.* in respect of the arrears of rent due on the joint tenancy of him and his wife did not prevent them from distraining on the wife's furniture on August 11 for the sum of 78*l.* 3*s.* 11*d.*, the then arrears, including the sum of 67*l.* in respect of which no dividend was ever received, or on the furniture after the wife's death for 77*l.* 1*s.* 8*d.*, which included the bulk of the sum of 67*l.*

Talbot J. gave judgment for 20*l.* damages for excessive distress, and in doing so relied on *Ex parte Grove.* (1) That is a very different case, as the distress was on the bankrupt's property, and further the decision has been criticized in

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(1) 1 Atk. 104.

Ex parte Devine (1), where it was pointed out that the decision really turned on the fact that the goods had been sold in the bankruptcy in which the landlord had proved.

[LORD HANWORTH M.R. May it not be that a debt is put an end to by proof in bankruptcy but not the special right conferred on a landlord to distrain? See *Briggs* v. *Sowry* (2) and *Newton* v. *Scott.* (3)]

It has to be shown here that the landlords by proving in the bankruptcy of a tenant are debarred from distraining against the goods of a co-tenant. It is true that they are joint tenants, but that would not prevent the landlord from levying distress against the goods of the co-tenant, though the act of proving against one of two joint tenants for arrears of rent might prevent the landlord's suing the co-tenant on the covenant to pay rent to the extent that the proof in bankruptcy bore fruit.

[ROCHE L.J. The question is how far the principle of *Kendall* v. *Hamilton* (4) and *King* v. *Hoare* (5) applies.]

It is contended that they do not apply at all. The appellants' case is assisted by *In re Neil Mackenzie* (6), and it shows that the distress was not excessive.

Assuming that the appellants were right on the first distress, they must also be right in regard to the second distress complained of. It is true that the plaintiff's wife had then died, but representation had not been taken out to her estate, nor was there evidence that the wife's estate was so small as to make this unnecessary. The property in the furniture was not then vested in the plaintiff, and the same arguments apply in regard to the second distress as in regard to the first.

[They were stopped.]

Viscount Erleigh K.C. and *W. D. Roberts* for the respondent.

[LORD HANWORTH M.R. It has to be shown that the principle of *King* v. *Hoare* (5) applies when there has been a proof in bankruptcy on which no dividend has been received.]

(1) (1776) Cooke's Bankruptcy Laws, 8th ed., p. 199.

(2) (1841) 8 M. & W. 729.

(3) (1842) 10 M. & W. 471.

(4) (1879) 4 App. Cas. 504.

(5) (1844) 13 M. & W. 494.

(6) [1899] 2 Q. B. 566, 573.

That a proof for arrears of rent prevents a distress for the same sum is established by *Ex parte Grove.* (1) It is true that in *Ex parte Devine* (2) an interpretation was put on the decision in *Ex parte Grove* (1) limiting its effect, but otherwise it has not been commented on, and in the text-books on bankruptcy it is accepted as authority for the wider proposition: compare Williams on Bankruptcy, 11th ed., p. 198. It is true that in Woodfall's Law of Landlord and Tenant, 20th ed., p. 344, it is treated as a less strong authority. When a receiving order was made against the plaintiff a statement of his assets was got out in the bankruptcy which stated that the furniture on the premises let to them belonged to his wife. That being so, the landlord knew the exact position, and was then free either to prove in the bankruptcy for arrears of rent or to proceed by distress against the wife's furniture. But having chosen to prove in bankruptcy he has no right of distress against the furniture.

The plaintiff is therefore entitled to say that the distress has been excessive as to both distresses, whether the goods distrained on were his or his wife's: *Fell* v. *Whittaker.* (3) He has a sufficient interest in the furniture by reason of his possession of it.

[LORD HANWORTH M.R. There is great difficulty in treating an unsatisfied proof as having the effect of a res judicata, and the decision in *King* v. *Hoare* (4) rests on there being a res judicata.]

If the defendants had commenced an action for the rent, they could not have recovered while their proof was in existence. Cannot the bankrupt say here that the defendants have chosen their remedy, namely, to prove in the bankruptcy, and that they must wait to see what dividend they receive?

[ROCHE L.J. The obligation to elect will not arise till a dividend is received in respect of the proof in bankruptcy: see *Ex parte Adamson, In re Collie.* (5)]

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(1) 1 Atk. 104.

(2) Cook's Bankruptcy Laws, 8th ed., p. 199.

(3) (1871) L. R. 7 Q. B. 120.

(4) 13 M. & W. 494.

(5) (1878) 8 Ch. D. 807.

The landlords' proof in bankruptcy affects the position of all creditors. They could not pursue the alternative remedy of distress without first withdrawing the proof. It may be that they could have done that at any time before they accepted a dividend, but in fact they did not do it. It follows that they were not entitled to distrain for any part of the sum of 67*l.* proved for, and therefore that the distresses of August 11 and December 3, 1932, were both excessive.

Cave K.C. in reply.

LORD HANWORTH M.R. This appeal involves a number of points of law which were not fully developed before the learned judge in the Court below. Indeed the learned judge, as I understand, felt himself bound to follow *Ex parte Grove* (1), but thought it was a case in which there ought to be a review of the authorities in the Court of Appeal. We have had the advantage, with the assistance of counsel, of going into a large number of authorities which were not before the learned judge; and I feel the less reluctance in differing with him because the case has developed completely different aspects from those which it wore when before the learned judge.

It is important that the facts of this case should be stated and fully understood. By an agreement made on May 17, 1926, the landlord, James Watt, who was the predecessor of the present defendants, let the premises in question to Charles Robert Holmes and his wife Mary Davison Holmes, who were together described as the tenant. It was a joint tenancy, and under that agreement they covenanted to pay a rent of 4*l.* 10*s.* a week. The tenants got into arrear with their rent, and a distress was levied in October of 1931. I ought to say that the agreement was for a definite period of three years, but it was continued by holding over between the parties, and the result was that there was a joint tenancy of the plaintiff and his wife from week to week at the rent of 4*l.* 10*s.* a week, but subject to the longer notice to quit provided for under the agreement. By January 1, 1932, there was a sum of 74*l.* 9*s.* 7*d.* due from the joint tenants in respect of rent, and a distress warrant for that amount was issued. On May 4, 1932, the landlord, James Watt, died. Probate was taken out to his estate and the appellants are his personal representatives. The rent was not paid but the occupation continued. On May 23, 1932, a receiving order was made against the plaintiff. On July 4 a notice was given to disclaim this tenancy, and on July 19 it was in fact disclaimed. The bankruptcy was one in which the assets were very small indeed, and the statement of affairs which I hold in my hand shows an apparent deficiency of 3182*l.* Therefore it was a case in which it was possible to apply the summary procedure under s. 129 of the Bankruptcy Act which applies to small estates of less than 300*l.* Although there was that disclaimer the two tenants did not give up the occupation of the premises. On July 18 a proof was carried in in bankruptcy for a sum of 67*l.*, being the rent which was claimed to have accrued due and to remain unpaid at the date of the receiving order. On August 11 a distress warrant was taken out for the sum of 78*l.* 3*s.* 11*d.*, but it is said that inasmuch as the proof had been carried in for 67*l.*, part of this sum, the distress should have been for 11*l.* 3*s.* 11*d.* and no more. The distress was levied, but on August 15 the plaintiff paid the bailiff 30*l.* on account with a request to withdraw from possession but with liberty "lawfully to make a second distress for the said rent and for the expenses incident to such distress." On the same day the plaintiff unhappily lost his wife and he remained in possession of the premises. The furniture which was on the premises was said to belong to his wife, and so far as the evidence goes, there is no proof that administration was granted to the present plaintiff or that the value of the goods was so small that a grant of administration would not be required. All that we do know is that the plaintiff remained in possession of the premises and of the goods which had belonged to his wife. On December 3 the plaintiff paid a further sum of 43*l.* 2*s.* 3*d.* on account of rent, making with the previous payment of 30*l.* a total of 73*l.* 2*s.* 3*d.* But further rent had meanwhile become due. It is said that by virtue of the payments made and of the proof in bankruptcy the only amount which was due on December 3 was 18*l.*, but the true amount would appear to be 77*l.* 1*s.* 8*d.*, a sum which includes the sum of 59*l.* 1*s.* 8*d.* out of the sum of 67*l.* for which a proof had been carried in to the plaintiff's estate. A distress was levied on December 3 for 77*l.* 1*s.* 8*d.* The present claim in the action is brought in respect of that distress and the distress of August 11, 1932, because it is said that as the defendants had elected to prove for the sum of 67*l.* in the plaintiff's bankruptcy and that proof was admitted, there was no liability at all in respect of that 67*l.* which could be enforced by distress, and that by reason of that the plaintiff wrongly levied a distress for 78*l.* 3*s.* 11*d.* on August 11 and for 77*l.* 1*s.* 8*d.* on December 3, and that the distress levied was therefore on both occasions excessive. It is not suggested that either distress was illegal or irregular: the claim is that it was an excessive distress. The defendants justify their action on the ground that the proof carried in against the plaintiff's estate in respect of which there was no dividend at all did not deprive them of the right to levy a distress for the whole amount due. The case was tried before the learned judge and a common jury, who awarded a sum of 20*l.* in respect of this excessive distress to the plaintiff. From that decision the defendants appeal, and we have now heard the matter at length.

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(1) 1 Atk. 104.

As already stated, the learned judge acted upon the decision in *Ex parte Grove* (1), which appears to be taken in some of the cases as establishing that a landlord cannot distrain and prove for the same rent, and that if he elects to carry in a proof he has lost his right of distress. *Ex parte Grove* (1) is a case which has been a good deal criticized, and in particular by Lord Bathurst in *Ex parte Devine.* (2) Lord Bathurst pointed out that the decision in *Ex parte Grove* (1) depended upon whether the assignees in the bankruptcy could make a good title to a purchaser. That was the real purport of the case, and it was held that they could. Turning to the report of the case I find it stated: "The issuing a commission

(1) 1 Atk. 104. (2) Cooke's Bankruptcy Laws, 8th ed., 199, 201.

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against a tenant, and the messenger's possession of the goods of the tenant, does not hinder the landlord from distraining for rent; for this is not such a custodia legis as an execution is, and there too the law allows the landlord a year's rent," that is even in bankruptcy. Lord Hardwicke says (1): "A landlord is considered in a higher degree than a common creditor, and it would be hard to preclude him from distraining where there are goods on the premises, and therefore he must be put to his election to waive his proof, or his distress."

How far does that case go? How far is it an authority binding at any rate upon this Court? In my view it is necessary to examine the Bankruptcy Acts to see whether or not the right of the landlord is taken away and, if so, how far. In the Bankruptcy Act, 1914, s. 7, sub-s. 1, it is provided that "On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose." The same provision appeared in s. 9 of the Act of 1883, which came up for consideration by Vaughan Williams J. in *In re Howell.* (2) He said (3): "It was contended on behalf of the trustee that the landlords' right of distress in respect of the first two months of the quarter was taken away by the joint effect of s. 9 of the Act of 1883, r. 19 of Sch. II., and the limitation in s. 42 . . . . and that by s. 9 no creditor in respect of any debt provable is to have any remedy against the property of the bankrupt except as is directed by the Act. . . . . But I think that contention fails." And he thereupon affirmed the right of the landlord to levy a distress, and held that s. 9 of the Act of 1883 had not deprived the landlord of his right of distress. It is quite true that by s. 42, as it was in that Act, now s. 35, there is a limitation imposed upon the right of the landlord to levy. Sect. 35, sub-s. 1, provides: "The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that, if such distress for rent be levied after the commencement of the bankruptcy, it shall be available only for six months' rent accrued due prior to the date of the order of adjudication and shall not be available for rent payable in respect of any period subsequent to the date when the distress was levied." That section, therefore, affirms the right of a landlord to levy a distress. That common law right is not removed, although the amount for which the landlord can hold the distress is limited to six months' rent accrued due prior to the date of the order of adjudication, and the distress is not to be available for rent payable for any period subsequent to the date when the distress was levied. Thus the distress cannot be levied in respect of rent which by agreement is payable in advance, but it does not prevent the levy of a distress in respect of rent which accrued after the date of the commencement of the bankruptcy other than rent payable in advance. *In re Howell* (1) definitely decides that in respect of rent which accrued by virtue of the Apportionment Act, 1870, prior to the date of adjudication, that is after the receiving order but before the adjudication, the landlord was entitled to distrain and to hold that rent.

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(1) 1 Atk. 105.

(2) [1895] 1 Q. B. 844.

(3) Ibid. 847.

There are other cases which must be considered. In *Ex parte Honey* (2) Mellish L.J. said: "Before the passing of the Act of 1861, although a proof could be made against both the joint and separate estates where the bankrupts had executed a joint and several guarantee or bond, or entered into a joint and several contract, yet the creditor could not receive a dividend from both estates, and he had to elect from which he would receive the dividend." That seems to indicate that by the mere carrying in of a proof the creditor

(1) [1895] 1 Q. B. 844.

(2) L. R. 7 Ch. 178, 182.

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does not lose his other rights, and it does not accord with the contention in the present case that by carrying in a proof the landlords were deprived of the further right of distress in respect of the amount proved for. I have dealt with that point under the Bankruptcy Act, and it is difficult to understand on what basis the doctrine is founded that the use of the one remedy deprives the landlord of his other remedy. We looked during the argument at *King* v. *Hoare* (1), which provides that a judgment recovered against one of two joint debtors is a bar to an action against the other. This is because the judgment changes the cause of action against the debtor into something of a higher nature. Very often, even if the judgment is unsatisfied, it is a bar to another action, because the judgment obtained is something different from the debt which gave a right to sue. That principle does not apply to the mere carrying in of a proof. There are two more cases to which I must refer. In *Briggs* v. *Sowry* (2) the headnote is as follows: "Where the assignees of a bankrupt, under the 6 George IV., c. 16, s. 75, have declined a lease to which the bankrupt was entitled, but the bankrupt has not delivered up the lease to the lessor, the property in the demised premises, in the mean time, continues vested in the bankrupt, and the lessor retains, until such delivery up to him, his right of distress for the rent." That appears applicable to the present case, because the debtor with his wife remained in possession of these premises from May 23, 1932, to August 15, and after August 15, when the wife died, the husband remained in possession of the premises from August 15 right down to December 3. During that time there was rent accruing due, rent which had not been included in the proof and which had accrued due subsequent to the date of the receiving order. In *Newton* v. *Scott* (3), where a landlord distrained on the goods of A. and the tenant afterwards became bankrupt and obtained a certificate, it was held by the Court of Exchequer Chamber "that the certificate did not operate as a release of the rent, and that the landlord had a right, in replevin at the suit of A., to avow for a return of the goods." Lord Denman definitely applies *Briggs* v. *Sowry*. (1) In those circumstances I find a difficulty in the present case in seeing that there has been any change or alteration which bars the right of the landlords to levy a distress in respect of the rent proved for. The claim has not passed into any higher right and no dividend has been received in the bankruptcy. The Bankruptcy Act recognizes the power of the landlord to levy a distress, and although I agree that there is by virtue of *Fell* v. *Whittaker* (2) sufficient interest in the furniture remaining in the plaintiff since his wife's death to enable him to bring an action for interference with his possession, yet unless he can establish that the landlord had no right to levy a distress for so large a sum there ought to be no damages awarded to him.

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(1) 13 M. & W. 494.
(2) 8 M. & W. 729.
(3) 10 M. & W. 471.

For the reasons which I have given it appears to me that the distresses levied were for sums in respect of which the landlord was not precluded from levying a distress and, in those circumstances, no right to damages arises, and the appeal must be allowed with costs and judgment entered in the action for the defendants with costs.

ROCHE L.J. I agree that this appeal should be allowed and that judgment should be entered for the defendants on the claim and counterclaim. My Lord has stated the relevant facts so fully that it is unnecessary to repeat them, but, having regard to the respect I feel for the learned judge from whose decision we are differing, I should like to give very shortly my reasons for arriving at the conclusion I have stated.

The tenancy in question was at the material times a tenancy of the plaintiff and his wife. At the time that the second of the two distresses complained of was made the wife was dead. The plaintiff brought and maintained his action in respect of property which had been his wife's and of which he was at all material times bailee but in respect of

(1) 8 M. & W. 729.

(2) L. R. 7 Q. B. 120.

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which he had no right of property whatever. That fact, I think, was not brought to the attention of the learned judge, and it is sufficient of itself to account for the difference between the conclusion at which the learned judge arrived and that at which this Court is arriving. Having regard to that circumstance, *Ex parte Grove* (1), on which the learned judge founded his judgment, however it be understood, is in my judgment no authority entitling the plaintiff to succeed in his action. I have no inclination, even had I the temerity, to criticize the decision of Lord Hardwicke in that case. Understood as I understand it, and I understand it in the same sense that Lord Bathurst understood it in *Ex parte Devine* (2), that case seems to me to be one at which no criticism can be directed. I am far, however, from saying that it is sufficient warrant for the broader proposition for which it is supposed to be an authority in certain text-books—namely, that when once a proof for rent has been lodged against the estate of a tenant who has become bankrupt there can never thereafter be a distress upon that tenant's goods in respect of that rent. I should require authority which has not been produced to us here before I was satisfied that this broad conclusion resulted from that case. As at present advised I am inclined to think that the mere lodging of a proof would at most give rise to the need for an election on the part of the landlord as to which remedy he desired to pursue. It will be noticed that I have laid emphasis on the fact that the lodging of the proof was the matter here relied upon. In this case, as my Lord has stated, not only is it beyond question that the landlords never received a dividend but there never was a dividend paid by the bankrupt's estate. I am therefore dealing with this case on the basis that it is the mere lodging or filing of a proof that is the matter which is supposed to have debarred the landlord from his right of distress. Taking the view, however, of *Ex parte Grove* (1) that I have stated it seems to me to have no relevance to the facts of this case. What the landlord did was that he proved against the estate

(1) 1 Atk. 104. (2) Cooke's Bankruptcy Laws, 8th ed., p. 199.

of one joint tenant who is the plaintiff and he afterwards distrained on the goods of the person who had formerly been a joint tenant with him, namely, the wife—goods which on her death became the property of her next of kin or of her legal representatives whoever they might be. If that operation of proving in the bankruptcy of one tenant and distraining upon the goods of his co-tenant be set up in this action as giving a right to damages, authority for that must be found elsewhere than in *Ex parte Grove*. (1) This is not a case where there has been a res judicata, as in *King* v. *Hoare* (2) or *Kendall* v. *Hamilton* (3), to which my Lord has referred, nor is it a case in which there has been a proof and receipt of a dividend. The law of election in bankruptcy is plain. My Lord has referred to *Ex parte Honey* (4), and the law, as there laid down by Mellish L.J., is that "although a proof could be made against both the joint and separate estates where the bankrupts had executed a joint and several guarantee or bond, or entered into a joint and several contract, yet the creditor could not receive a dividend from both estates, and he had to elect from which he would receive the dividend." The same statement of the law, namely, that time for action is open until receipt of a dividend, was laid down by James L.J. in *Ex parte Adamson* (5), delivering the judgment of himself and Baggallay L.J. It had been objected that proof against one estate was an election not to proceed against another estate, but the Lord Justice said: "By a rule which was established by the Courts (it is difficult to see on what principle or by what authority) a creditor having a joint legal or equitable demand against a partnership, and a several one against the members, or some of the members, of the same partnership, was not entitled to go against the joint estate and the separate estates, but was entitled to choose between them; and it was laid down in the books that the election must be made before the receipt of a dividend." Here no dividend was received in respect of this

(1) 1 Atk. 104.
(2) 13 M. & W. 494.
(3) 4 App. Cas. 504.
(4) L. R. 7 Ch. 178, 182.
(5) 8 Ch. D. 807, 817.

estate of the bankrupt and until the landlords had a chance of receiving a dividend or had to elect whether they would take a dividend or not it seems to me impossible to contend, having regard to the facts of the case and the doctrine to which I have referred, that they had no right to distrain in respect of the sum which was due from the wife as well as the husband. For those reasons I think that the decision that the distress was excessive, which means that the rent was not due because there had been already a proof in respect of it, cannot be supported, and that the judgment on the claim and counterclaim should be as stated by the Master of the Rolls.

SWIFT J. I agree.

Appeal allowed.

Solicitors: *E. Sabine Read; W. R. Perkins.*

H. C. G.

SOCIEDAD ANONIMA COMMERCIAL DE ESPORTACION E IMPORTACION (LOUIS DREYFUS & CIA), LIMITADA v. NATIONAL STEAMSHIP COMPANY, LIMITED.

1935
May 23.

Shipping—Charterparty—Carriage of Grain—" Full reach and burthen of the steamer "—Right of shipowners to carry passengers.

Where a ship has been chartered to carry goods, in the absence of any prohibition, express or implied, in the charterparty, the shipowners are entitled to carry passengers if they can do so consistently with their obligations to the charterers.

The plaintiffs chartered a ship belonging to the defendants to carry grain from the River Plate to European ports. A clause in the charterparty provided: " The charterers are to have the full reach and burthen of the steamer including 'tween and shelter decks, bridges, poop, etc. (provided same are not occupied by bunker coals and/or stores) ":—

Held, that the clause applied to cargo space only. It did not preclude the shipowners from carrying passengers.

Shaw, Savill & Co. v. *Aitken, Lilburn & Co.* (1883) Cab. & El. 195, considered.

Action in the Commercial List tried by Branson J.

The plaintiffs had chartered two of the defendants' steamships, the *Harpasa* and the *Harcalo*, to load grain in the River Plate for European ports. The two charterparties (which were entered into on April 11 and April 12, 1935), were in "Centrocon" form and in similar terms.

By clause 2 it was agreed between the owners and the charterers that the steamer should proceed as ordered by the charterers to one of the undermentioned ports and there receive for them a full and complete cargo, except as qualified by clause 19, of wheat and/or maize and/or rye. Then it provided for the ports at which the steamer should load.

Clause 4 provided that "Being so loaded the steamer shall with all reasonable speed therewith proceed to St. Vincent (Cape Verdes) or Las Palmas or Teneriffe (Canary Islands) or Madeira or Dakar, at the master's option, for orders (unless these be given to him by charterers on signing bills of lading) to discharge at Liverpool, Birkenhead, Manchester, Cardiff, Barry, Avonmouth, Swansea, London, Hull, Antwerp, Rotterdam or Amsterdam (one port)." Clause 6 gave an option to the charterers to ship other lawful merchandise instead of the wheat or maize or rye which was provided for by clause 2, and also provided that "The charterers are to have the full reach and burthen of the steamer including 'tween and shelter decks, bridges, poop, etc. (provided same are not occupied by bunker coals and/or stores)." Clause 19 expanded the provisions of clause 2 with regard to the obligation to load a full and complete cargo, and it provided that the ship need not load more than 7480 tons and was not to load less than 6120 tons, and provided that she had loaded her cargo within the above mentioned limits it was not incumbent upon the master to sail with a full and complete cargo. Clause 21 provided for the signing of the bills of lading upon the form printed upon the back of the charterparty. Clause 22 provided for orders with regard to the port of discharge. Clause 23 gave the charterers an option of ordering the steamer from the port of call to go to Falmouth for final orders to discharge. Clause 29 (which was an exceptions clause) provided (inter alia) that the steamer was not to be liable for loss or damage caused by quarantine restrictions. It also provided that "The steamer shall have the liberty to call at any port or ports in any order, for the purpose of taking bunker coal or other supplies, to sail without pilots, to tow and be towed, to assist vessels in distress and to deviate for the purpose of saving life and property."

One of the steamships was loading in the River Plate and a dispute had arisen between the plaintiffs, the charterers, and the defendants, the shipowners, on the question whether the shipowners were entitled to take on board certain passengers for the homeward voyage. Accordingly, by a writ dated May 21, 1935, the plaintiffs claimed a declaration that, under the terms of two charterparties, both in "Centrocon" form and in similar terms by which the plaintiffs had chartered two of the defendants' ships for the carriage of grain, the defendants were not entitled to carry passengers on either of the ships, and also claimed an injunction restraining the defendants from carrying passengers.

Cyril T. Miller for the plaintiffs. The charterparty is the ordinary charterparty for the carriage of goods, as distinguished from passengers, from the River Plate to European ports. The defendants are not, by the terms of the charterparty entitled to carry passengers on either ship. Under the charterparty, the charterers are to have the whole of the steamship at their disposal for the carriage of grain, which was its main purpose and intent. If it is to be held that the shipowners are entitled to carry passengers, that will so alter the original intention of the parties as to amount to a deviation such as was discussed in *Glynn* v. *Margetson & Co.* (1) and in *Attorney-General* v. *Smith (Benjamin) & Co.* (2) In *Shaw, Savill & Co.* v. *Aitken, Lilburn & Co.* (3), it was held that under a contract similar to the one in this case, the charterers were not entitled to carry passengers. It is submitted that the same principle should apply to the carriage

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(1) [1893] A. C. 351.

(2) (1918) 119 L. T. 252.

(3) Cab. & El. 195.

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of passengers by the shipowners. Further, the words "including 'tween and shelter decks, bridges, poop, etc.," in clause 6 of the charterparty, so extend the meaning of the phrase "the charterers are to have the full reach and burthen of the steamer," as to include passenger accommodation. The shipowners are, therefore, not entitled to carry passengers.

W. L. McNair for the defendants. The charterparty does not amount to a demise of the steamship, and the shipowners remain in possession of the steamship. They have merely contracted to render certain services to the charterers. The shipowners say that the two steamships are theirs, and in so far as they (the shipowners) have not parted with their right to use the steamships or any portion of them by the charterparties, they are entitled to use the steamships as they wish, so long as that does not prevent them from carrying our their express obligations to the charterers. Looking at the charterparties, it will be found that the carriage of passengers is not prohibited, because it is not inconsistent with any of the obligations which the shipowners have undertaken towards the charterers. The decision in *Shaw, Savill & Co.* v. *Aitken, Lilburn & Co.* (1) was based on the admission that there was no demise of the ship, and that case, properly looked at, is an authority in support of the view that the shipowners in this case are entitled to carry passengers in such parts of the steamships as are not necessary for the particular purposes of the charterparties—namely, the carriage of grain. The charterers are entitled to the full use of the cargo spaces only.

Branson J. This action raises a short point in the following way. The plaintiffs are the charterers of two steamships, the *Harpasa* and the *Harcalo*. The charterparties are mutatis mutandis identical, the one having been entered into on April 11, 1935, and the other on the next day. The *Harpasa* is now loading in the River Plate and a dispute has arisen between the plaintiffs, the charterers, and the defendants, the owners, as to whether her owners are entitled

(1) Cab. & El. 195.

or not entitled to take on board certain passengers for the homeward voyage. The way in which the case is put for the charterers is this: It is said that looking at the charterparty, which I shall have to do in a moment, it will be found that it is on the face of it the ordinary charterparty for the carriage of goods as distinguished from passengers from the River Plate to European ports, and it is said that if it be held that the owners are entitled to carry passengers that will so alter the original intention of the parties to the contract as to amount to a deviation such as was discussed in *Glynn* v. *Margetson & Co.* (1) and in the *Attorney-General* v. *Smith (Benjamin) & Co.* (2) On the other hand, it is said by the defendants, the shipowners: "This is our ship and, in so far as we have not parted with our right to use it or any portion of it by our contract with the plaintiffs, we are entitled to do with it whatsoever we like." Mr. McNair goes on to say: "If you look at the charterparty you will find that the carriage of passengers is not prohibited because it is not inconsistent with any of the obligations which the ship has undertaken to the charterers."

[His Lordship referred to the charterparty and continued:] That being the charterparty, one thing is perfectly plain, and that is that it does not amount to a demise of the ship. That being so, it seems to me that I must begin the consideration of this case by bearing in mind that the defendants are the owners of the ship and, in so far as they have not restrained their full rights of ownership by the charterparty, those rights remain in them. Mr. Miller in his ingenious argument contends that they have restrained their rights and he says they have restrained them by entering into a charterparty which is for the conveyance of grain from the River Plate to European ports, which says nothing expressly about passengers; and he says that when one considers the possible effects of carrying passengers it will be found that to do so is inconsistent with the obligations undertaken. I think if it could be said that to carry passengers was inconsistent with the obligations undertaken then the plaintiffs would be right.

(1) [1893] A. C. 351.

(2) (1918) 119 L. T. 252.

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Branson J.

The question is : Can it be said that the carriage of passengers is in any respect inconsistent with the obligations undertaken by the charterparty ?

The first way in which it is suggested to be so is because it is said that to take on passengers increases the risk of the ship being detained in quarantine. The next way in which it is put is that if the taking on of passengers did lead to delay of the ship the c.i.f. buyer of the grain which had been shipped might claim to reject for the delay. The third way in which it is said that it might conflict is that the c.i.f. buyer would expect when he got the bill of lading that it was a bill of lading given by the shippers of one cargo which was to be delivered at one port, and if he found that there were passengers whose presence might necessitate one of them having to be landed because he was ill and it was necessary to do so to save his life, that would occasion delays upon the voyage. Dealing with those points, I think the answer to them is as follows : If the contract contains nothing to prevent the ship from carrying passengers, then neither the charterer nor any holder of a bill of lading given by him could have any claim or right of rejection arising out of any delay which the carriage of the passengers might cause, because ex hypothesi to carry passengers would be one of the rights of the ship which had not been defeated by contract. Unless therefore it can be said that the suggestions which are put forward on this head are such that by reason of them the shipowners must be taken by implication to have agreed not to carry passengers, there is no force in that argument at all. With regard to implied terms, in order to imply a term into a contract between two commercial men who are sitting down to make a contract in writing one must be able to conclude that if the point had been raised when they were discussing the contract they would both have said : "Well, that goes without saying ; we need not put it in." If you cannot find that amount of certainty about the matter the court will not read an implied term into a written contract. It cannot possibly be said, as it seems to me, that these rather far drawn possibilities of trouble which might arise from the carriage of passengers could ever have been treated, if it had occurred to anybody to think of them at all, in the way in which I think they would have had to be treated before one could imply a term in this charterparty that the shipowners would not carry passengers.

The last way in which it is said that the charterparty has disentitled the shipowners from the carrying of passengers is that under clause 6 of the charter " the charterers are to have the full reach and burthen of the steamer including the 'tween and shelter decks, bridges, poop, etc. (provided same are not occupied by bunker coals and/or stores)." Mr. Miller quite fairly and frankly admits that in a charterparty the words " full reach and burthen of the steamer," apply prima facie to cargo spaces only. That is decided by the case of *Weir* v. *Union Steamship Co.* (1), and no question can arise on that.

But it is said that this clause expands the meaning of those words by going on to include the 'tween and shelter decks, bridges, poop, etc., and it is said that the passenger accommodation which this ship possesses may be held to come within that description so that the right to use that accommodation has been taken from the ship and handed over to the charterers. I think, dealing with the matter first apart from authority, that I should hold that when one looks at this sentence as a whole—" The charterers are to have the full reach and burthen of the steamer including the 'tween and shelter decks, bridges, poop, etc. (providing same are not occupied by bunker coals and/or stores) "—one does not get any such extension of the ordinary prima facie meaning attached to the words " full reach and burthen of the steamer." I cannot think that it was ever intended that any part of the accommodation of the ship which was not cargo space in the ordinary acceptation of that term could be included, having regard to the proviso that " the same are not occupied by bunker coals and/or stores " ; in other words, the generality of the earlier words has to be controlled by the proviso which indicates that the spaces which are intended to be dealt with in the earlier words are to be spaces which might in the ordinary

(1) [1900] A. C. 525.

course be used for bunker coals and/or stores. I do not think that anybody considering the passenger accommodation which we know that this ship possessed would, with that language before him, conceive the possibility of filling the state rooms or the dining room with either coals or stores, any more than they would think of filling the captain's cabin or the officers' rooms or the accommodation of the crew. Therefore I think that the argument for the charterers that the shipowners have disentitled themselves from carrying passengers by having entered into this charterparty fails.

I have come to that conclusion apart from authority, but I think that the case of *Shaw, Savill & Co.* v. *Aitken, Lilburn & Co.* (1) is an authority for the view which I am taking of this charterparty. There an action was brought by charterers against the shipowners in the following circumstances. The vessel was chartered to go to Wellington, in New Zealand, and there to receive a full and complete cargo in consideration of a lump sum freight. The vessel went to Wellington and there loaded a full and complete cargo of lawful merchandise, the cabin spaces being left unoccupied. The charterers then desired to fill those cabin spaces by carrying passengers to England, and their right to do so was disputed by the shipowners. The charterers and the shipowners thereupon agreed that the spaces should be used and the passengers should be carried for the benefit of whom it might concern. This was done and then both parties sought to adduce evidence to prove a custom, the charterers to prove a custom that in some circumstances they should have the use of the cabins, the shipowners to prove a custom that they should have the use of the cabins. The case came before Denman J. who found that both parties failed altogether to prove any custom at all. He therefore proceeded to decide the case upon the construction of the charterparty. The judgment, which is quite short, proceeds as follows (2): " The attempt to prove a custom utterly failed on both sides. Nothing of the sort exists. The matter must therefore be decided on the construction of the charterparty and the authorities bearing on the point. Mr.

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(1) Cab. & El. 195.

(2) Ibid. 196.

Cohen contended that the authorities show there is no right to use the cabin spaces for cargo. Mr. Bigham, while admitting that there was no demise of the ship, contended that when the whole charterparty was looked at, it amounted to an undertaking that the plaintiffs should have the use of the whole ship, and that although passengers were not cargo, yet the plaintiffs having the use of the ship, might use the ship for passengers." Then the learned judge refers to the argument with regard to the tonnage, and goes on: " Reliance was also placed on the words 'use and hire of the ship.' In my opinion, however, these words are used indifferently; and the meaning is that the charterer should have the use or hire of the ship for the purpose of carrying lawful produce and merchandise only, and not passengers. The ship is at their disposal for a particular purpose only. The defendants are therefore entitled to the freight earned by the carrying of the passengers."

The net result, therefore, is that, starting from the fact that unless they have precluded themselves from carrying passengers in their ship the shipowners are entitled to do so, and holding, as I do hold, that there is nothing in the charterparty which does so preclude them, the declaration asked for by the plaintiffs cannot be made, nor can the injunction which they ask for be granted.

Judgment for the defendants.

Solicitors for the plaintiffs: *Thomas Cooper & Co.*

Solicitors for the defendants: *William A. Crump & Son.*

T. W. M.

1935
March 27.

LONDON COUNTY COUNCIL *v.* HARLING STREET (OWNERS).

Metropolis—Building Acts—Demolition—Work executed by Council on Default of Owners—Expenses—Jurisdiction of Magistrate to determine Amount—London Building Act, 1930 (20 *&* 21 *Geo.* 5, *c. clviii.*), *s.* 141 *sub-s.* 1.

On an application by the London County Council to a petty sessional court under s. 141 sub-s. 1, of the London Building Act, 1930, for an order for the payment of the expenses of demolishing dangerous structures on the default of the owners, after due notice, to demolish them, the magistrate has jurisdiction to inquire into the reasonableness of such expenses and to determine their amount.

CASE stated by a Metropolitan Police Magistrate.

At a court of summary jurisdiction holden at Lambeth complaints were made by the appellants, the London County Council, that they, acting under the provisions of the London Building Act, 1930 (20 & 21 Geo. 5, c. clviii.) had incurred expenses in respect of certain structures which had been duly certified to them to be in a dangerous state, and that the council had not been paid and had not recovered the expenses. The expenses claimed were as follows: In respect of No. 7 Harling Street in the borough of Camberwell 136*l.* 18*s.* 4*d.*; of No. 15, 91*l.* 9*s.* 8*d.*; of No. 17, 145*l.* 9*s.* 4*d.*; and of No. 19, 177*l.* 15*s.* 8*d.* The magistrate reduced the above claims, as regards No. 7 to 108*l.* 18*s.* 4*d.*; No. 15 to 76*l.* 9*s.* 8*d.*; No. 17 to 70*l.* 9*s.* 4*d.*; and No. 19 to 102*l.* 15*s.* 8*d.*, an aggregate reduction of 193*l.*

The following facts were admitted or proved: Notices under s. 132 of the London Building Act, 1930, had been duly served, but were not complied with. On January 28 and July 14, 1932, orders under s. 141 sub-s. 1 of the Act were made by Mr. Sandbach K.C., a Metropolitan Police Magistrate, requiring the respondents, the owners, to comply with the notices, but the orders were not complied with. Consequently, the work required by the said notices to be done was done by the appellants, and the above sums claimed were paid by them.

The appellants caused the work to be done by Holland & Hannen, Ld., contractors ("the contractors"), under a general contract dated May 16, 1919. By clause 18, sub-clause 9, of the contract: "As regards any old metals ordered to be removed off the site the contractors shall give credit for such metals at the market rates current at the date of removal. . . ." By clause 19 the contractors were, within fourteen days after completion, to deliver to the architect an account stating the sums (if any) to be credited to the council for old materials removed by the contractors, and no payment was to be made in respect of the work unless the architect certified that the contractors were entitled thereto, and the architect's decision was to be final. The architect certified that the contractors were entitled to the above sums as claimed. By clause 28 the appellant council reserved the right to themselves to execute any of the work referred to in the contract.

There are in existence firms known as demolition contractors who specialize in demolition work and in the sorting and disposal of débris and material upon site, and have an organization which enables them to obtain the best prices for such débris and material. Holland & Hannen, Ld., the contractors, had no experience in the marketing of old materials.

In the course of carrying out the work it became necessary to remove débris and material, and accordingly the contractors accepted a tender by Messrs. Woodham to remove them, 119*l.* being paid to the latter in respect of the removal. 1*l.* was realized for the sale of old timber and duly credited to the appellants.

The magistrate found that the débris and material should have realized 75*l.* sold on the site, the purchasers paying the cost of removal.

The magistrate also found that the work done in pursuance of the aforesaid orders was not primarily demolition work, and that, consequently, the appellants had acted properly and reasonably in entrusting the work to the contractors, and that the contract was a reasonable contract. That as the contractors had no experience in the marketing of old materials they should have obtained the advice of some one expert in that particular branch of the building trade, or have employed a demolition contractor to do it for them, and that in those circumstances 75*l.* should have been realized as above stated, and that in addition the sum of 119*l.* paid to Messrs. Woodham should not have been paid. He held that in exercising his jurisdiction under s. 141 sub-s. 1, of the London Building Act, 1930 (1), he was entitled to examine the items of expenses claimed, and that on the evidence a reduction ought to be made from the amount of the expenses in regard to the value of the old materials and the removal thereof. He therefore disallowed the said 119*l.* for removal and allowed to the respondents the said 75*l.*, less the 1*l.* realized for old timber, and allocated the reductions as above set out respectively, but stated this case.

Picciotto for the appellants. The magistrate was wrong and has travelled far outside s. 141 sub-s. 1 of the Act. He has found that the contract was a reasonable one, that the work was not primarily demolition work and that the appellants acted reasonably in employing the contractors. There is nothing in that contract making it obligatory on the contractors to employ demolition contractors. If the appellants had disputed these claims with the contractors on the grounds now set up by the respondents, the latter could have relied on that fact. It may be that the respondents have a remedy against the appellants or the contractors, but

(1) London Building Act, 1930 (20 & 21 Geo. 5, c. clviii.), s. 141: "(1.) Where the council have incurred any expenses in respect of any dangerous or neglected structure and have not been paid or have not recovered the same a petty sessional court on complaint by the council may make an order fixing the amount of such expenses and the costs of the proceedings before such petty sessional court and directing that no part of the land upon which such dangerous or neglected structure stands or stood shall be built upon or that no part of such dangerous or neglected structure if repaired or rebuilt shall be let for occupation until after payment to the council of such amount and thereupon and until payment to the council of such amount no part of such land shall be built upon and no part of such dangerous or neglected structure so repaired or rebuilt shall be let for occupation."

that remedy is not in the magistrate's court. The respondents, having failed to do the work themselves, took the risk of it not being done by others in the most economical way.

[LAWRENCE J. The magistrate having found that the contract was a reasonable one, surely he can inquire whether it was carried out ?]

No. He has no right to say that the appellants must stand over the contractors and see if they are carrying out the contract. No doubt the words in s. 141 sub-s. 1 of the Act do give the magistrate a limited discretion, the limits of which it is difficult to fix. But in *Debenham* v. *Metropolitan Board of Works* (1), where the magistrate had held that he was bound to allow the whole of similar expenses as claimed, although the appellant alleged that they were unreasonable, the Court held that he was right. When the architect in the present case had certified the amount payable, that amount became the " expenses " within the meaning of the sub-section, and there can be no further inquiry.

Done for the respondents. This is mainly a question of fact for the magistrate. The suggested contract between the appellants and the contractors was not a contract but a running tender. The appellants were not bound to accept it, but were free to make and ought to have made other arrangements to include more favourable terms for the removal of the débris, or, as under the contract they had the right, to have done the work themselves. Arrangements between them and the contractors cannot affect the respondents' rights. Sect. 141 of the Act of 1930 gives the magistrate jurisdiction to intervene in the interests of owners. His order creates what may be called a charging order, and the function of the Court is to control the exercise of the powers thereunder as flowing from a judicial and not from a ministerial act. That would confer a jurisdiction to decide whether the expenses had been reasonably incurred. The word " fix " in s. 141 sub-s. 1 involves the idea that the magistrate shall ascertain the proper amount and not merely order payment of the amount as claimed. Otherwise it is superfluous.

(1) (1880) 6 Q. B. D. 112.

There must be some discretion in the magistrate, for in exercising their powers on the owners' default the appellants might do unnecessary things, e.g., demolish portions not in fact unsafe, or do work not necessary to the carrying out of the magistrate's order. In the report of *Debenham* v. *Metropolitan Board of Works* (1) in the Law Journal Reports (2) it appears that the work was done by contractors under a contract made some time before the particular work was done, so that the Board was bound to employ them. In the report in the Law Times Reports (3) Lord Coleridge C.J. reserves the point as to the duty of the magistrate in a case where unreasonable expenses have been incurred. Moreover in the section in question in that case—s. 73 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122)—nothing is said about the amount of the expenses being fixed by the magistrate; it only says that they " shall be paid by the owner."

[*New River Co.* v. *Westminster City Council* (4) was also referred to.]

The appellants, in the absence of express powers, had no right to dispose of this débris, which belonged to the respondents.

[*Hayles* v. *Sandown Urban District Council* (5) was referred to.]

Picciotto in reply. The grant of the right to remove the débris—which removal the magistrate finds was reasonable—is involved in the sections which confer the powers of demolition.

[*Crisp* v. *London County Council* (6) was referred to.]

AVORY J. In this case, the London County Council, acting under the provisions of the London Building Act, 1930, complained to the learned magistrate that they had incurred expenses in respect of certain structures which had been certified to be in a dangerous state, and the amounts of those expenses are set out in the case. Upon the hearing of the complaints the learned magistrate with regard to two of the

(1) 6 Q. B. D. 112.
(2) 50 L. J. (M. C.) 29.
(3) 43 L. T. 596, 597.
(4) (1904) 73 L. J. (K. B.) 1009.
(5) [1903] 1 K. B. 169.
(6) [1899] 1 Q. B. 720, 725.

buildings ordered that the amounts claimed should be paid; with regard to four of the buildings, he ordered that the amounts should be reduced by various sums which are set out in the case; and the real question in this case is whether the learned magistrate had any power to reduce the amounts which were claimed, or whether he was bound to allow as against the owners the full amounts.

The case finds that notices under the Act had been duly served; that those notices were not complied with; that orders had been made by another magistrate requiring the owners of the structures to comply with the notices, and that the orders had not been complied with: and that thereupon the work required to be done by the notices and by the orders was caused to be done by the appellants, and that the appellants in fact paid to the contractors the sums which were the subject of the complaints, and not having been paid those expenses by the owners on demand, they took the course of applying by information before the learned magistrate.

It appears that the work in question was done by a well known firm of contractors, under a contract which was a kind of running or general contract, providing for the doing of such building work as the appellants should from time to time require to be done. Clause 18, para. 9, of the contract provided that, as regards any old metals ordered to be removed off the site, the contractor should give credit for them at the market value current at the date of removal, subject to the deduction of a certain percentage. Clause 19, which is all-important in this case, provides that the contractor shall, after completion within a certain number of days, make out and deliver to the architect an account for the works and things executed, and labour provided under this contract, and state the sums (if any) to be credited by the contractor to the council for old materials removed by the contractor.

I pause here to say that as the contract clearly contemplated old materials being removed by the contractor, in my opinion it is not necessary to decide any question of law which Mr. Done has argued as to the power of the contractor to remove such old materials.

The clause then continues : " No payment shall be made to the contractor until and then only to the extent to which the architect shall have certified in writing that the work, labour and materials, etc., have been executed to the satisfaction of the architect, and that the contractor is entitled to such payment under this contract " ; and it concludes with the words " any decision of the architect under this clause shall be final." In my opinion, the provision that the decision of the architect under that clause shall be final is merely conclusive and binding as between the county council and the contractor, and it is not conclusive or binding against the owners of the premises when the claim is made to recover the expenses from them.

It is only necessary to refer to one or two other material facts in the case. It appears that in the course of carrying out the work it was found impracticable, owing to the premises being occupied and to the restricted space available for the stacking of débris and material, to store and sort such débris and material on or about the premises, and that, consequently, it was removed, because it was found that trespassers were making use of it for unlawful purposes. The contractors obtained tenders for its removal, and accepted one amounting to 119*l.*, and that amount was included in the amount which the appellants had paid to the contractors and sought to recover in the present case. There was a small item of 1*l.* stated to have been realized by the contractors by the sale on the site of timber resulting from the demolition work, and we are told that credit was given for that sum of 1*l.* It is then further found that the débris and materials resulting from the demolition work would have realized the sum of 75*l.* if sold on the site, the purchasers paying the cost of removal, and the learned magistrate sets out the way in which that sum of 75*l.* is made up. It is also found that the consent of the owner of the premises to the removal or the disposal of the material was not obtained.

The contention on behalf of the appellants was that the contract was a reasonable contract ; that as the work required to be done was not primarily or mainly a work of demolition, it was unnecessary and impracticable for the appellants to entrust the work to a firm of demolition contractors, and that in the circumstances it was reasonably necessary for the carrying out of the said work to remove and cart away the débris and material, and that the powers conferred upon the appellants by s. 133, sub-s. 1, of the London Building Act, 1930, to do the said work, included power to do all that was reasonably incidental thereto, and that the amount which they were entitled to recover ought to include the sum of 119*l.*, being the cost of carting and removing the débris and material, as a sum properly incurred in the doing of the work.

On the other hand, the respondents contended that the appellants were only entitled to recover expenses reasonably incurred in relation to the carrying into effect of the order of the magistrate, and that it was open to the magistrate in fixing the amount of expenses incurred by the appellants, to disallow such charges incurred by the appellants as were unreasonably incurred, or were incurred as a result of a reasonable contract being carried out in an unreasonable manner, and that it was open to him, in fixing the amount, to consider any allowances which should have been made by the contractors in accordance with the express or implied terms of the contract, and to assess the amount of such allowances, and to deduct the amount of such allowances from the amount of the expenses.

I do not think it is necessary to lay any stress upon the next contention: that the contract under which the appellants caused the work to be done was not a reasonable contract on the ground that, had a firm of demolition contractors been employed, the débris and material could have been sold on the spot, thus saving the expense, it being found as a fact that this was not simply a work of demolition. I do not think that the non-employment of such contractors is of importance.

Lastly, the contention of the respondents was that, even if the contract was a reasonable contract, the contractors were bound, under the express or implied terms thereof, to give credit for the value of old materials removed by them, and that the appellants should have insisted upon receiving a proper credit for such materials; that in the circumstances the appellants had overpaid the contractors, and that if the appellants caused the old materials to be removed, they must be held accountable for the value thereof.

The magistrate found as facts; that the work done in pursuance of the orders was not primarily demolition work; that the appellants therefore acted properly in entrusting the work to the contractors under the contract; that the contract was a reasonable contract; that the appellants were entitled to do all things necessary for and incidental to the carrying out of the work specified in the orders, and that in the circumstances of the case the removal of the débris and material was reasonably necessary for and incidental to the carrying out of such work; that it was the duty of the contractors to realize reasonable sums in respect of the old materials, and that the appellants should have insisted upon that being done and a proper credit being given. He also goes on to find that as the contractors had no experience in the marketing of old materials, they should have obtained the advice of some one expert in that particular branch, or have employed a demolition contractor to do it for them; that the contractor, acting reasonably, if he had the proper experience or employed those who had, would have realized 75*l.* for the sale of the old materials on the site, the purchasers paying the cost of removal, and that therefore the sum of 119*l.* paid to Messrs. Woodham should not have been incurred by the appellants, and in addition, the sum of 75*l.* should have been realized to set off against the cost of the works; and he expresses his opinion that he was entitled to examine the items of expenses claimed by the appellants, and that, on the evidence, a reduction ought to be made from the amount of the expenses in regard to the value of the old materials and to the removal thereof; and accordingly, he disallowed the said charge of 119*l.* for the removing, and he allowed the sum of 75*l.* to the respondents, less 1*l.* for the timber actually realized by the sale of materials.

I have come to the conclusion, after listening to a very full and able argument by Mr. Picciotto, which has been, in my opinion, satisfactorily answered by Mr. Done, that the magistrate was right in this case, and that he had jurisdiction to inquire into the amount of the expenses which had been properly incurred under the terms of s. 141 sub-s. 1 of the London Building Act, 1930, which provides that where the council have incurred any expenses in respect of any dangerous or neglected structure, and have not been paid or have not recovered the same, a petty sessional court, on complaint by the council, may make an order fixing the amount of such expenses and the costs of the proceedings before such petty sessional court. Then it goes on to provide for what is called a charging order on the land until the amount of the sum ordered has been paid. In my opinion, the crucial words in that section are that the magistrate may make an order "fixing" the amount of such expenses. That cannot mean that he is merely to make an order directing the payment of the amount which is claimed, and that is the essential distinction between the present case and the case of *Debenham* v. *Metropolitan Board of Works* (1), which was relied upon by the appellants. In that case the words of the section were different. The words of s. 73 of the Metropolitan Building Act, 1855 (which was the statute), in that case were, in effect, that the magistrate was to make an order for the payment of the expenses incurred. There was no discretion under those words for him to inquire into whether they had been properly incurred, and no discretion given to him in that case to fix the amount of the expenses. And I think some support for this view is to be found in the case of *Reg.* v. *Local Government Board* (2), which was a decision under s. 268 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), under which an appeal was given to the Local Government Board by any person aggrieved by an order for expenses incurred by the local authority in paving a new street. It was contended in that case, after a memorial had been sent to the Local Government Board appealing against an order for the payment of such expenses, that a prohibition ought to go to the Board on the ground that they had no power to inquire into anything except

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(1) 6 Q. B. D. 112.

(2) (1882) 10 Q. B. D. 309.

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Avory J

one matter which had been put forward in the memorial; but Brett L.J. disposed of that point in these words (1): "It seems to me obvious from the construction of the Act that the Local Government Board have power to inquire into every circumstance however remote, which could reasonably determine the question, whether it was inequitable or not that a particular sum should be paid. . . . . They inquire into them as facts in order to enable them to determine upon the largest interpretation of the word 'equitable' that can be given to it, whether the particular sum is one which it is equitable, fair, and right that the individual should be forced by the legislature to pay for works which have been done against his will; and therefore I should be loth to the extremist degree to fetter the power of the Local Government Board to inquire into every fact, which could reasonably lead them to a fair and equitable conclusion with regard to that question which is the question before them. . . . . I think they ought to have the largest powers and the largest discretion to inquire into everything, to examine every fact which may lead them to a fair conclusion as between the local authority and the individual who has presented the memorial. Therefore, even if prohibition will lie in this case, there is no ground for saying that the Local Government Board, if they are about to enter into the question whether some of this work was unnecessary, and if they are about to inquire into the question whether the total sum was unreasonable, and if they are about to inquire into the question whether it was fair or equitable to declare the expenses to be private improvement expenses, or whether they should be recovered by summary process, would exceed their power and authority, if they did inquire into them. There is therefore nothing to prohibit, even if a prohibition lies."

I have only one word to add, which I omitted when I was dealing with the terms of this contract and the certificate of the architect—namely, that although that certificate may be binding and conclusive as between the county council and the contractor, and although the county council in fact have paid

(1) 10 Q. B. D. 325, 326.

the amount as certified by the architect, in my view the effect of s. 141 sub-s. 1 is that even then it is open to the magistrate to intervene as between the county council who are making the claim, and the owner of the premises who is being called upon to pay, and, as Brett L.J. said in that case, *Reg.* v. *Local Government Board* (1), to do justice between the London County Council and the owner of the premises, and to decide whether the amount which is being claimed is justly due. (1) And I think that he had evidence upon which he could properly determine as he has done with regard to these two amounts of 119*l.* and 75*l.*, and that therefore he was entitled to make the allowances and deductions which he did make. The appeal, therefore, in my opinion, should be dismissed.

HAWKE J. I have come to the same conclusion. I had considerable doubts in the course of the argument, but I think the thing boils itself down to this short point, and I therefore do not propose to cover the arguments of my learned brother. The magistrate has to make an order fixing something. Mr. Picciotto's argument very nearly comes to this: that that means that the magistrate has merely to make an order recording something. But Mr. Picciotto could not go as far as that; he said, very frankly, he did not quite know where the limit was, but at any rate it did not cover this case. I think, having heard the arguments, that the magistrate has to fix the amount which he thinks is properly due. It is not for me to say whether I should have arrived at the same conclusion as the magistrate on the question of fact; but I cannot see that he has departed in any way from his duty to fix the amount, after taking a view of what was reasonable between the parties, and therefore I agree that the appeal should be dismissed.

LAWRENCE J. I am of the same opinion, and have nothing to add.

Appeal dismissed.

Solicitor for appellants: *Solicitor to the London County Council.*

Solicitors for respondents: *Pennefather & Co.*

W. L. L. B.

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(1) 10 Q. B. D. 309, 326.

1935
April 10, 11,
12, 15;
May 17.

FENDER *v.* MILDMAY.

Breach of promise—Promise made by married man pending decree nisi obtained by his wife—Promise not enforceable—Public policy.

In 1930 the plaintiff, a young woman, met the defendant, who was, to her knowledge, a married man. In 1932 sexual intercourse began between them. On January 16, 1933, the defendant's wife obtained a decree nisi for the dissolution of her marriage with him. On February 21 and in April, 1933, the defendant promised to marry the plaintiff when his wife's decree nisi should be made absolute. On July 31, 1933, the decree was made absolute, but the defendant refused to marry the plaintiff. In an action brought by the plaintiff against the defendant claiming damages for breach of promise of marriage:—

Held, that the defendant, when he made the promises relied on by the plaintiff, was a married man and, notwithstanding the granting of the decree nisi, under full marital obligation to his wife, and, therefore, the promises were illegal and unenforceable as being against public policy. The promises were no less contrary to public policy as tending to the continuance of sexual relations which already existed than they would have been as tending to create those relations if not already established.

Spiers v. *Hunt* [1908] 1 K. B. 720; *Wilson* v. *Carnley* [1908] 1 K. B. 729; dicta of Lord Dunedin in *Skipp* v. *Kelly* (1926) 42 Times L. R. 258; *Noice* v. *Brown* (1876) 23 Am. Rep. 213 applied.

ACTION tried by Hawke J. with a special jury.

The plaintiff, Emily Fender, claimed from the defendant, Sir Anthony St. John-Mildmay, damages for breach of promise of marriage.

At the trial it was proved that the plaintiff and the defendant, who was then married, met in 1930. In 1932, the defendant having told the plaintiff that he would marry her if and when his wife divorced him, sexual intercourse took place between them. Later in the same year Lady Mildmay, the defendant's wife, instituted divorce proceedings against him, alleging adultery between him and the plaintiff. On January 16, 1933, Lady Mildmay obtained a decree nisi for the dissolution of her marriage with the defendant. On February 21, 1933, and in April, 1933, the defendant promised to marry the plaintiff when his wife's decree nisis was made absolute. These were the promises relied on by the plaintiff in support of her claim. Lady Mildmay's decree was made absolute on July 31, 1933. Subsequently the defendant refused to marry the plaintiff, and in 1934 he married another woman.

The defendant at the trial admitted the promises and the breach of them and relied on the defence in law that, at the time of the promises, he, to the plaintiff's knowledge, was a married man and the promises were, therefore, illegal and void as being against public policy.

The jury returned a verdict in favour of the plaintiff, assessing the damages at 2000*l.*, and the legal point raised in the defence was then argued.

Roland Oliver K.C. and *P. B. Morle* for the defendant. The plaintiff is not entitled to judgment. A promise of marriage made by a person who, to the knowledge of the promisee, was at the time of the making of the promise married is void because it is against public policy as tending to make the promisor disregard the general rules of morality, and it cannot, therefore, be enforced by action: Halsbury's Laws of England, 2nd ed., vol. vii., pp. 159, 163; *Spiers* v. *Hunt* (1); *Wilson* v. *Carnley* (2); *Skipp* v. *Kelly* (3); *Noice* v. *Brown.* (4) The fact that at the time of the promise the spouse of the promisor has obtained a decree nisi for the dissolution of the marriage makes no difference. The status of a married woman, and her rights where her husband is concerned, are not affected by the pronouncement of a decree nisi. A marriage subsists until the decree nisi is made absolute: *Norman* v. *Villars.* (5)

[They also referred to *Prevost* v. *Wood.* (6)]

Eddy and *Jeffreys Jones* for the plaintiff. The plaintiff is entitled to judgment. Public policy changes with economic and social conditions: *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (7); *Attwood* v. *Lamont.* (8) Of

(1) [1908] 1 K. B. 720.

(2) [1908] 1 K. B. 729.

(3) (1926) 42 Times L. R. 258.

(4) N. J. Ct. of Err. & App. (1876) 23 Am. Rep. 213, affirming N. J. Sup. Ct. 20 Am. Rep. 388.

(5) (1877) 2 Ex. D. 359.

(6) (1905) 21 Times L. R. 684.

(7) [1894] A. C. 535, 541, 547, 553, 556, 564.

(8) [1920] 3 K. B. 571, 581.

recent years a social revolution has occurred in the public mind regarding the relations between the sexes and the undesirability of maintaining the marriage tie where there is no possibility of a married couple living together again: Brown & Latey on Divorce, 11th ed., p. 92. That was recognized by Sir Henry Duke P. in *Wilson* v. *Wilson* (1), where the President said that one of the factors to be taken into account when the Court is considering whether to exercise its discretion in favour of a guilty party is "the interest of the woman with whom he [the petitioner] has misconducted himself, that she may be in a position to marry him." That was approved by Lord Birkenhead L.C. in *Wilkinson* v. *Wilkinson and Seymour* (2), followed in *Elliott* v. *Elliott and Bowers* (3) and *Apted* v. *Apted and Bliss.* (4) It is not now contrary to public policy to enable or to encourage a man who has committed adultery with a woman to "make an honest woman of her." The cases, therefore, cited on behalf of the defendant in no way help the Court to decide what is contrary to public policy in 1935 in relation to the matters raised in the present case. Modern policy, admittedly, is to protect the married state, but when a wife has obtained a decree nisi against her husband she has foregone the right to the consortium of her spouse and he is released from the obligation of marital loyalty to her. In such circumstances there is no married state to protect. In *Atherton* v. *Yarde-Buller* (5), where the defendant had, after her husband had obtained a decree nisi against her but before that decree was made absolute, promised to marry the plaintiff, Darling J. left open the question whether the promise was contrary to public policy. Moreover, the basic reason why such promises are contrary to public policy is that they tend to create immoral relations between the promisor and the promisee. In the present case the promises sued on could not have such a result, as immoral relations had been established between the plaintiff and the defendant before the promises were made.

(1) [1920] P. 20.
(2) (1921) 37 Times L. R. 835.
(3) (1921) 37 Times L. R. 834.
(4) [1930] P. 246.
(5) (1907) Times, Dec. 11, p. 14.

Morle, in reply, referred to *Stirling* v. *Maitland.* (1)

Cur. adv. vult.

May 17. HAWKE J. It has been submitted on behalf of the defendant that the plaintiff is not entitled to recover the damages awarded her by the jury on the ground that, at the time the defendant promised to marry her, he was to her knowledge a married man and that the promises were, therefore, illegal and void as being against public policy. The decision of that question has been rendered more difficult for me by the apparently conflicting dicta of Lord Dunedin on the one side in *Skipp* v. *Kelly* (2) and of Darling J. on the other in *Prevost* v. *Wood.* (3) Mr. Oliver relied on the decisions in *Wilson* v. *Carnley* (4) and *Spiers* v. *Hunt* (5), and he also drew my attention to the American case, *Noice* v. *Brown* (6), which was referred to with approval by Phillimore J. in *Spiers* v. *Hunt.* (7) He further referred to the dicta of Lord Dunedin in *Skipp* v. *Kelly* (2), and he submitted that the principles established by those cases were conclusive of this matter. *Noice* v. *Brown* (6) was certainly singularly similar in its facts to the present case, save that it is not very clear from the report how far the divorce proceedings which were taking place between the defendant and his wife had gone. In my opinion, the cases relied on by Mr. Oliver cover this matter, and my decision must be in favour of the defendant.

Out of respect for the argument of Mr. Eddy, however, I feel that I ought to make some further observations. Mr. Eddy pointed out that the decisions to which I have referred and on which the defendant relied were based on the principle of public policy, and he contended that public policy may change or expand as time goes on. In support of that proposition he cited *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (8), and *Attwood* v. *Lamont* (9), and he went on to argue that public policy had changed on the question whether a promise by a married person to marry a third party was valid. By way of enforcing that argument he referred to the fact, about which there can be no doubt, that in recent years there has been a profound change in the principles on which judges in the Divorce Court act when exercising their discretion in favour of guilty petitioners. In that connection he cited *Wilson* v. *Wilson* (1) ; *Wilkinson* v. *Wilkinson and Seymour* (2) ; and *Apted* v. *Apted and Bliss.* (3) I do not think, however, that the principles on which discretion is exercised in the Divorce Court bear on the present case. In the Divorce Court discretion is exercised by a judge who has all the facts before him and considers how far he can go in the particular case with which he has to deal. That seems to me to be an entirely different thing from saying that law and policy are so much changed that the parties to a marriage, between themselves and by their own actions, can put an end to the legal obligations of matrimony. Much less do I think that anything which one of them may do can be construed as a licence to the other to disregard the general law.

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(1) (1864) 5 B. & S. 840.
(2) (1926) 42 Times L. R. 258.
(3) (1905) 21 Times L. R. 684.
(4) [1908] 1 K. B. 729.
(5) [1908] 1 K. B. 720.
(6) 23 Am. Rep. 213.
(7) [1908] 1 K. B. 727.
(8) [1894] A. C. 535
(9) [1920] 3 K. B. 571.

Mr. Eddy next submitted that the cases on which Mr. Oliver relied were distinguishable on the facts from the present case, or, in the alternative, that it could not be against public policy to uphold such a promise as that relied on by the plaintiff in this case if one of the parties to the marriage, in this instance Lady Mildmay, had gone so far as, not merely to file a petition for divorce, but to obtain a decree nisi. He said that Lady Mildmay, by so doing, had in some way absolved the defendant from his marital obligations at least to such an extent that it would be lawful and proper for him to promise to marry the plaintiff and that the promises which he made were, therefore, enforceable. I do not think that the mere fact that an aggrieved party to a marriage has taken proceedings for divorce and has carried them so far as to prove certain facts and obtain a decree nisi is sufficient to entitle the wrongdoer to make a promise inconsistent with

(1) [1920] P. 20.

(2) 37 Times L. R. 835.

(3) [1930] P. 246.

the obligations of the marriage which is in law still subsisting. That argument, which was based on an alleged cessation of the mutual loyalty required in marriage, appears to ignore the principle that marriage is not a mere matter of agreement between two parties. To some extent it is an agreement, no doubt, but marriage creates obligations to other persons than the parties to it. It creates in children interests which may be vital to their well-being. At any time before the marriage was finally dissolved Lady Mildmay might have changed her mind and appealed to the defendant to return to her for the sake of their child, and that appeal might have had sufficient weight with him to result in his resuming relations with his wife. No promise to marry made by him in those circumstances can be relied on by the plaintiff. On this point I should like to refer to the judgments in *Noice* v. *Brown.* (1) In that case a married man had promised a woman that he would marry her as soon as a divorce should be decreed between him and his wife in a suit then pending. The proceedings had begun, but how far they had gone the report does not show. The parties to the marriage had separated, and it might be said that there was not much mutual loyalty between them. Runyon, Chancellor, in giving judgment on appeal, said (2) : " Here was no deceit, but the plaintiff was fully apprised of the fact that the defendant was married, and the fulfilment of his promise was expressly dependent upon the result of a pending suit for divorce, brought by his wife against him. Such a promise, made under such circumstances, is, for the reasons given in the opinion of the Supreme Court, clearly against public policy, and no action can, therefore, be maintained upon it." In giving the judgment of the Supreme Court of New Jersey, Beasley C.J. said (3) : " This plaintiff claims the right to take to herself that affection of this husband, which, in legal theory at least, belongs to the wife ; but such a transfer the law will not sanction. Such conduct is a gross violation of the rights of the wife. Nor, in a legal point of view, does it at all strengthen the argument to suggest that the defendant, at the time of making this promise, was living separated from his wife, and was looking forward to a divorce. While the marriage exists the duties inherent in such marriage likewise exist, and they cannot be thrown off at the will of either party. By voluntarily withdrawing from the society of his wife a man cannot free himself from his matrimonial obligations." In my view, it is not the law that Lady Mildmay, by her actions, in some way freed the defendant from his marital obligations towards her. I do not think that this is merely artificial. If I had to do so, I might express an opinion as to the probability of a reconciliation having taken place between Lady Mildmay and the defendant, but I do not express any opinion on that matter. All I will do is to say that, in my judgment, the law requires the observance by the parties of all the obligations of a marriage until that marriage is finally dissolved by a court of justice.

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(1) 23 Am. Rep. 213.

(2) 23 Am. Rep. 214.

(3) 20 Am. Rep. 389.

A further argument put forward on behalf of the plaintiff was that one of the objections to the enforcement of such a promise as those sued on by the plaintiff was that it had a tendency to lead to immorality and that that could not apply to the present case, because sexual relations had occurred between the plaintiff and the defendant before the promises were made. But that argument is of very little force. Even if sexual relations have already taken place between the parties a subsequent promise to marry may well result in continued intimacy, and I can see no difference, from the point of view of public policy, between a promise tending to the creation of immoral relations and a promise tending to their continuance.

On this issue, therefore, there must be judgment for the defendant. (1)

Judgment for the defendant.

Solicitors for plaintiff: *Percy Haseldine & Co.*

Solicitors for defendant: *Sutton, Ommanney & Oliver.*

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(1) In the action the plaintiff also claimed the return of certain jewelry which she alleged had been given her by the defendant, but that matter was disposed of by agreement at the trial.

G. F. L. B.

NASH *v.* STEVENSON TRANSPORT, LIMITED.

1935
June 21, 24.

[1935. N. 367.]

Road Traffic—Goods Vehicles—Licence—Trader entitled to licence—Agreement for use of name and tonnage by another person—Illegality—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 1, *sub-ss.* 1, 3, 8; *s.* 2, *sub-s.* 6; *s.* 6, *sub-s.* 1; *s.* 7, *sub-s.* 2; *s.* 16, *sub-s.* 1; *s.* 21.

The plaintiff, who was entitled by virtue of s. 7, sub-s. 2, of the Road and Rail Traffic Act, 1933, to obtain as of right Class A licences in respect of goods vehicles up to a certain tonnage, did not wish to use those vehicles himself. He entered into an agreement with the defendants whereby, in consideration of a money payment by the defendants, the defendants were to be entitled to operate the vehicles in the plaintiff's name, under the plaintiff's licences (which could not, by s. 21 of the Act, be transferred or assigned by him to the defendants). In an action by the plaintiff to recover the sum payable under the agreement:—

Held, that although the agreement did not purport to transfer or assign the plaintiff's licences, it could not be carried into effect without the commission by the defendants of a criminal offence under s. 1 of the Act, since the defendants would be using vehicles in respect of which they had no licence. Nor could the plaintiff, who had licences, but who was not the person using the vehicles within the meaning of s. 1, comply with the requirements of s. 16 by keeping, or causing to be kept, the records therein mentioned.

The agreement was therefore illegal, and the plaintiff's claim failed.

ACTION tried by Humphreys J. in the Short Cause List.

The plaintiff, John George Nash, claimed 375*l.* alleged to be due from the defendants Stevenson Transport, Ld., under an agreement in writing made between the plaintiff and defendants on May 18, 1934. The defendants admitted the agreement, but alleged that it was entered into with the object of the defendants acquiring by transfer or assignment public carriers' or Class A licences to be obtained by the plaintiff under the provisions of the Road and Rail Traffic

Act, 1933 (1) (hereinafter called "the Act"), in respect of the use of vehicles mentioned in the agreement. They said that by s. 21 of the Act such licences were not capable of being transferred or assigned; and that the agreement was illegal, void and unenforceable.

Mr. Nash, who traded as the Nash Transport Company, had during the year beginning on April 1, 1932, used goods vehicles belonging to him, or in his possession under a hire purchase agreement, mainly for the purpose of the carriage of goods for hire or reward, and was entitled under s. 7, sub-s. 2, of the Act to have granted to him licences in

(1) The Road and Rail Traffic Act, 1933, s. 1, sub-s. 1: "Subject to the provisions of this Part of this Act, no person shall use a goods vehicle on a road for the carriage of goods—

(*a*) for hire or reward; or

(*b*) for or in connection with any trade or business carried on by him,

except under a licence."

Sub-s. 3: "When a goods vehicle is being used on a road for the carriage of goods, the driver of the vehicle, if it belongs to him or is in his possession under an agreement for hire, hire purchase or loan, and in any other case the person whose agent or servant the driver is, shall, for the purposes of this Part of this Act, be deemed to be the person by whom the vehicle is being used."

Sub-s. 8: "If any person uses a vehicle in contravention of this section, he shall be guilty of an offence under this Part of this Act."

Sect. 2 makes provision for three classes of licences known as A, B and C licences respectively.

Sub-s. 6: "The vehicles authorised to be used under a licence shall be—

(*a*) such motor vehicles, being vehicles belonging to the holder of the licence or in his possession under a hire purchase agreement, as are specified in the licence;" .... (other classes of vehicles are specified, in each case with the qualification 'belonging to the holder of the licence or in his possession under an agreement for hire purchase' or similar words).

Sect. 5 prescribes the method of application, and the particulars to be furnished by an applicant for a licence.

Sect. 6, sub-s. 1: "Subject to the provisions of the next succeeding section, the licensing authority—

(*a*) on an application for an A licence or for a B licence, shall have full power in his discretion either to grant or to refuse the application, or to grant a licence in respect of motor vehicles other than those of which particulars were contained in the application, or in respect of motor vehicles or trailers less in number than, or differing in type from, those for the use of which authorisation was applied for; ...."

Sect. 7, sub-s. 2: "If, on an application for an A licence made not later than the first day of April, 1934, or such later date as the Minister may appoint, the respect of vehicles having an aggregate weight unladen of not less than 40 tons 12 cwt., whereas the grant of such licences to applicants not within s. 7, sub-s. 2, was within the discretion of the licensing authority, and was subject to the giving of notices and to possible opposition.

The plaintiff, not wishing himself to use the licences to which he was entitled, desired if possible to sell to the defendants the benefit of his rights, and the material clauses of the agreement dated May 18, 1934, were as follows:—

"1. The said John George Nash shall, if he shall not already have done so, lodge his claim for haulage licences Class A in respect of as much tonnage as is allowed to him in respect of the said ownership and wagons.

2. Should such claims be successful to a minimum of 40 tons 12 cwt. unladen weight the sum of 375*l.* shall be paid by the company to the said John George Nash within a

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applicant shows to the satisfaction of the licensing authority that during the year beginning on the first day of April, 1932, he used any goods vehicles belonging to him, or in his possession under a hire purchase agreement, mainly for the purpose of the carriage of goods for hire or reward, the licensing authority shall grant the application in respect of vehicles having an aggregate weight unladen not less than the aggregate weight unladen of any such vehicles so used by the applicant at any one time during the said year."

Sect. 11 makes provision for publication of notices of applications and for objections thereto, but exempts therefrom an application which the licensing authority is bound to grant.

Sect. 16, sub-s. 1: "Subject to the provisions of regulations made under this section, the holder of a licence shall keep or cause to be kept, in accordance with the regulations, current records showing—(*a*) as respects every person employed by him as a driver or statutory attendant of an authorised vehicle, the times at which that person commenced and ceased work and particulars of his intervals of rest and the like information as respects himself when acting as such a driver or attendant; (*b*) as respects every journey of a vehicle on which goods are carried under the licence, particulars of the journey and of the greatest weight of goods carried by the vehicle at any one time during the period to which the record relates and the description and destination of the goods carried, and the regulations may make provision for requiring drivers of authorised vehicles to carry the prescribed documents and to make any prescribed entries therein."

Sect. 21: "Subject as hereinafter provided, a licence shall not be capable of being transferred or assigned: . . . ."

fortnight after such final notification has been made to the said . . . . John George Nash.

7. The said John George Nash shall grant the company the use of the name of himself and of Nash Transport Company in so far as it is necessary in connection with the running of any vehicles in respect of the licences so to be obtained and shall sign all necessary documents as may be required to that end . . . .

8. Notwithstanding anything contained in this agreement the parties expressly agree and declare that should it be ascertained that the company cannot in law and rightfully obtain the normal and proper use of the licences so to be applied for by the said John George Nash the said sum of 375*l.* shall thereupon be repaid by the said John George Nash to the company . . . ."

Notification of successful claims was made to the plaintiff on November 14, 1934, but the defendants refused to pay the sum of 375*l.* provided for by the agreement.

Beney for the plaintiff.

I. A. Macaulay for the defendants.

Cur. adv. vult.

June 24. Humphreys J. In this case the plaintiff claims a sum of 375*l.*, which is admittedly due on the terms of an agreement dated May 18, 1934. The only defence open to the defendants is that the agreement is illegal and therefore void. It is said that it is illegal because it involves breaches of the Road and Rail Traffic Act, 1933.

The plaintiff, Mr. John George Nash, who was trading under the name of Nash Transport Company, was a person who had been carrying on the business of providing goods transport by road, and he had brought himself within s. 7, sub-s. 2, of the Act referred to.

The effect of that sub-section is this: The Act itself was passed mainly in order to bring under the licensing authorities vehicles used for carrying goods for hire by road and the persons who use those vehicles; and in any ordinary case any one desiring to obtain a licence must make an application and give various particulars. Opposition, if there is any, must be heard, and it is entirely within the discretion of the licensing authority to refuse or grant the application. The one exception is that provided for by s. 7, sub-s. 2, which creates a privilege in favour of any person who was during the year beginning April 1, 1932, carrying goods by road for hire with vehicles belonging to him or in his possession under a hire purchase agreement. Such a person is entitled to licences for tonnage equivalent to that which he was using during the year in question. Mr. Nash had that right to what is called "tonnage," to the extent of something over 40 tons. He was entitled to apply the tonnage as he liked and to any vehicles so long as he did not exceed the tonnage allowed.

Mr. Nash had disposed of various lorries which he had been using during the prescribed year and he was desirous of selling to some one that right to tonnage, and the position between himself and the defendants is clearly shown by two letters passing between the parties.

On March 23, 1934, Mr. Nash wrote:—

"We are certain of obtaining 40 tons, 12 cwt. unladen weight, and, possibly, we shall obtain 51 tons, 10 cwt., 99 lbs.

We are asking, for the sale of this tonnage, which is transferable as it belongs to a company which we are closing down, the present business being run under a new company, the price of 450*l*. . . . ."

On the same day the defendants replied, pointing out that the tonnage for disposal would be of no use to them or to any one else, unless the right to use the plaintiff's name was included, "as it would be impossible for any one to claim licences on this tonnage in any other name."

On March 26 Mr. Nash replied: "The claimable tonnage belongs to Nash Transport Co., of which I am the sole proprietor; in fact, therefore, it belongs to me. . . . The name of Nash Transport Co., or my name, as sole proprietor, will, of course be available to any extent that is necessary to make the transfer valid."

On May 18, 1934, the agreement sued on was signed. [His Lordship read the material clauses.] It is not without interest, in view of the legal contentions, to observe from the wording of clause 8 that both parties were obviously doubtful if they could legally carry out such an arrangement. That clause never came into operation, because the sum of 375*l.* was never paid and therefore never became repayable.

It is not clear how this arrangement was to be carried out. But I am satisfied, and it is the basis of my judgment, that it was agreed between the parties, and that the agreement in question necessarily involved, that the vehicles to which the licences were to be attached were to be provided and owned by the defendants, that the plaintiff was to be neither the owner nor the driver of any of these vehicles, and thirdly that Mr. Nash was not connected with and was not to be connected with the defendant company in any way. By that I mean that he was not to become a director of or have any other connection with the company except that the sum of 375*l.* was to be paid to him.

In these circumstances, the defendants obtained leave to defend this action upon an affidavit which alleges that the agreement was illegal, because it was entered into with the object of the defendant company's acquiring the licences to be obtained by the plaintiff. The affidavit goes on to refer to s. 21 of the Act, by which it is in effect provided that no such licence can be transferred. It is argued, therefore, that for that reason the agreement was illegal and void, and counsel for the defence put that ground in the forefront of his contentions. Put in that way, I cannot give effect to that argument. It seems to me clearly wrong to say that one of the things to be done under the agreement was to transfer or assign the licences.

The object of the agreement was not that the licences should be assigned, but it was entered into because the parties knew that the licences could not be assigned. If a person is able to secure a desired result by legal means, I know

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of no rule of law making his action illegal because by illegal means he might have brought about the same result. If the parties could find a legal way, well and good. There are observations in *Laceby* v. *E. Lacon & Co. Ltd.* (1) which, as well as the ratio decidendi of the case, are very material here. In that case a person was granted a new licence in respect of new premises on condition that he should surrender the licence which he already held in respect of existing premises. Objection was raised by the owner of the premises from which the licence was to be taken away on the ground that the justices had in effect ordered a removal of the licence to the new premises, and that the owner had an absolute veto on their doing so. The argument found favour with the Divisional Court and the Court of Appeal, but when the House of Lords came to consider the matter they pointed out that it was one thing to do what the justices had done, namely, to grant a new licence on condition that the old one was surrendered, and another thing to grant a removal which they had never been asked to grant and had in fact never granted at all. Lord Morris (2) said this: "Then what is the objection to that licence which is good upon the face of it? It is said that although it is a licence on the face of it as a grant for a new licence, yet it amounts to an order for a removal. Sometimes it is said 'in substance,' sometimes it is said 'in effect,' and sometimes it is said 'the consequences are the same,' but the argument is that it amounts to an order for a removal under s. 50 of the Licensing Act. As I have said, on the face of it it does not purport to be anything of the sort; it purports to be what it is—a grant of a new licence." Lord Watson (3) used these words: 'It is not enough to say, as some of the judges have said, that the two things are in substance the same. It is not enough to say that the result of either proceeding must be the same. The Court must come to the conclusion, in order to bring the matter within the statutory prohibition, that what has been done is one of the things which the Legislature

(1) [1899] A. C. 222.

(2) [1899] A. C. 222, 231.

(3) Ibid. 230.

have prohibited." Lord Halsbury made similar observations. I cannot, therefore, accede to the argument of Mr. Macaulay on this point. But s. 21 of the Act of 1933 is, no doubt, a very valuable section from the point of view of the defendant, and, coupled with some other sections, is an indication that the scheme of this legislation is that any one wishing to have a licence must prima facie apply for a new licence, because no machinery is provided in the Act, permitting the transfer of A.'s licence to B.

The licensing authority being required to have regard to the several matters mentioned in s. 6, sub-s. 2, there being no power to transfer a licence, and there being in s. 20 a provision that nothing in the Act is to be treated as conferring on the holder of a licence any right to the continuance of any benefits arising from the provisions of that part of the Act, or from a licence, or from any conditions attached to a licence, it would seem that prima facie at least the scheme of the Act is that any person who is not himself a privileged person who wishes to have a licence to operate this class of vehicle, must apply for a new licence. Such an application involves a complete discretion on the part of the licensing authority to grant or refuse it. It is argued with great force that the privilege conferred by s. 7, sub-s. 2, is confined to the person named in the section and that, as he cannot transfer licences obtained by him as a privileged individual, so he cannot by lending his name to a purchaser confer any right to licences which the purchaser can only acquire under the terms of the Act.

I do not find it necessary to decide this case on that ground, nor to decide the question whether an agreement is illegal because it runs counter to the general tenor of an Act of Parliament. In this case there is a complete answer to the action to be found in the circumstance that this agreement could not be carried out without necessarily involving the defendants in the commission of a criminal offence. I arrive at that conclusion after examining s. 1 of the Act. The form of the licence here shows that it is one to an individual in respect of certain named vehicles identified by their numbers. With regard to the person who is indicated by the words "no person shall use," it is obvious in this case that the defendants were going to be the users of the vehicles. The driver was going to be one of their servants. But they had no licence. What answer is there to the allegation that in the circumstances they would be using these vehicles without a licence? Mr. Nash was not to provide vehicles or drivers.

My view is confirmed by s. 2, sub-s. 6, of the Act, which contains the definition of authorized vehicles. Having regard to the language of that sub-section it was impossible to carry out this agreement. The vehicles must belong to the holder of the licence, but they were obviously not to belong to Mr. Nash.

Sect. 16 also seems to show that it would be quite impossible that Mr. Nash, who is the person looked to by the licensing authority to carry out the conditions attaching to the licence, would be able to carry out those conditions. How could Mr. Nash keep the records required by that section to be kept? These sections are material in supporting the view which I have formed mainly on s. 1, sub-s. 1, that the agreement necessarily involved the user on the road by the defendants of vehicles for which they are not licensed and in respect of which they would be committing a criminal offence because s. 1, sub-s. 8, provides that any one contravening the terms of the section shall be guilty of an offence. Sect. 25 deals with the punishments to be inflicted in the event of contravention.

Mr. Beney relied first of all on s. 12, which deals with a holding company. The section specially prevents difficulty where a holding company holds a licence and another company operates the vehicles. The important words in s. 12, sub-s. 1, are "signifies to the licensing authority." Where the holding company inform the licensing authority they may be relieved from penalties which would otherwise be incurred. Here, the object was to prevent the licensing authority from knowing that the operators of the vehicles were not the licensees. Mr. Beney then relied on a letter of October 26, 1934, from

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the defendants to the plaintiff, which contained the suggestion that the defendants should take up the licence in their own name, and that for that purpose the plaintiff should write to the licensing authority offering to withdraw his application for the licence on condition that an equivalent licence was granted to the defendants. The defendants added that similar licences had recently been granted in that manner in Liverpool. Counsel argues from that that the arrangement could be carried out by means of a scheme which would be lawful, and that hence the agreement is one which could be carried out in a lawful manner. The answer is that some agreements might be lawfully carried out, but not this one. That letter makes clearer even than before that the original agreement was realized to be impossible to work and that a new one was wanted. Finally, Mr. Beney relies on *Mellor* v. *Lydiate* (1), the Liverpool brewer's case. In that case the Court of Appeal only decided that where a brewer owned a licensed house and proposed to take the profits and put in a manager as his servant, the manager holding the proper licence, the brewer under such an arrangement could not be said really to be selling liquor without a licence. In order to bring that case and this into line, it would be necessary that Mr. Nash should be running the vehicles. But the whole point of the agreement is that he should have nothing to do with running them. For these reasons, I am of opinion that the defence has been made out and there must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiff: *Ernest C. Randall.*

Solicitors for defendants: *Field, Roscoe & Co., for Luya & Williams, Liverpool.*

(1) [1914] 3 K. B. 1141.

J. W. H.

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Revenue—Sur-tax—Legacy—Interest payable thereon—No election by Legatee whether he would or would not claim interest—Assessment of Legatee on amount of Interest payable on Legacy—No Income received in respect of interest thereof—Legatee not chargeable to tax.

Under the will of a testator the respondent was appointed one of the executors and was bequeathed a legacy of 1,000,000*l.* free of legacy duty. The testator died on April 11, 1930, and his will was duly proved in May of the same year. The executor's year expired on April 11, 1931, when the legacy of 1,000,000*l.* became payable and thenceforth in law carried interest at 4 per cent. per annum on such part of it as was for the time being unpaid. The testator's estate was at all material times sufficient to enable interest to be paid on the legacy. In April, 1932, the respondent, acting on the advice of his accountant, decided to allow the question of interest to stand over, and he had not at any material time received any sum in respect of interest. The respondent was assessed to sur-tax in the sum of 50,180*l.* for the year ending April 5, 1933, which included a sum of 40,000*l.*, representing interest at 4 per cent. on the legacy of 1,000,000:—

Held (affirming the decision of Finlay J.), that as the respondent had not received any of the interest there was no income in respect of it on which he could be charged to tax.

APPEAL from a decision of Finlay J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on May 10, 1934, John Arthur Dewar appealed against an assessment to sur-tax in the sum of 50,180*l.* for the year ending April 5, 1933.

By his will dated October 22, 1927, Lord Dewar, after appointing Mr. J. A. Dewar and Mr. Peter Dewar to be the executors and trustees thereof, bequeathed to Mr. J. A. Dewar the sum of 1,000,000*l.* free of legacy duty. Mr. J. A. Dewar was also residuary legatee to the extent of two-thirds of the residue of Lord Dewar's estate.

Lord Dewar died on April 11, 1930, and his will was proved on May 30, 1930. As from April 11, 1931 (one year from the date of the death of Lord Dewar), the legacy of 1,000,000*l.* in law carried interest at the rate of 4 per cent. per annum on such part of it as for the time being was unpaid. The

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first payment received by Mr. Dewar in respect of the legacy was made on April 14, 1932, of 30,000*l.*, and other payments were made on various later dates. Lord Dewar's estate was at all material times sufficient to enable interest to be paid on the legacy.

On or about April 14, 1932, Mr. Dewar, acting on the advice of his accountant, decided to allow the question of interest on the legacy to stand over, and he had not at any material time received any sum in respect of interest. It was stated by Mr. Dewar's counsel before the Special Commissioners that Mr. Dewar at the date of the appeal had made no election whether or not he would claim the interest. The assessment appealed against included a sum of 40,000*l.* representing interest at 4 per cent. on the legacy of 1,000,000*l.*

It was contended for Mr. Dewar that in computing his total income for the purposes of sur-tax no sum fell to be included in respect of interest on the legacy, and that the assessment should be reduced by 40,000*l.*

It was contended for the Commissioners of Inland Revenue that the sum of 40,000*l.* was at all material times at the disposal of Mr. Dewar, and was therefore correctly included in the computation of his total income for the purposes of sur-tax, and that the assessment was correct in principle and amount and should be confirmed.

The Special Commissioners, after stating the facts, gave their decision as follows :—

" In our opinion the principle laid down in such cases as *St. Lucia Usines and Estates Co.* v. *St. Lucia (Colonial Treasurer)* (1) and *Lambe* v. *Commissioners of Inland Revenue* (2) does not apply to a case such as the present, where there has been no default in payment.

" In this case the appellant has for the present for reasons of his own voluntarily waived his right to receive the payment of interest, and on these facts we hold that the voluntary foregoing of interest ought to be regarded simply as being an application of the interest : see *Reade* v. *Brearley* (3)."

(1) [1924] A. C. 508.
(2) [1934] 1 K. B. 178.
(3) (1933) 17 Tax Cas. 687 at p. 693, per Finlay J.

The Commissioners therefore held that the sum of 40,000*l.* had been correctly included in the assessment, which they accordingly confirmed.

Finlay J. allowed the appeal, holding that as Mr. Dewar had never received the 40,000*l.* personally or by his agent, there was no income in respect of it on which he could be charged to tax.

The Crown appealed. The appeal was heard on July 1, 2, and 3, 1935.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the Crown. The interest payable on the legacy of 1,000,000*l.* is assessable to sur-tax. The Case finds that interest at the rate of 4 per cent. on the unpaid legacy became payable as from a year from the death of Lord Dewar and was so during the whole of the financial year 1931–1932. The fact that the respondent had not elected to require payment does not prevent sur-tax being charged on that interest for the year ending April 5, 1933. The position is the same as in the case of interest due under a debenture which has not been paid owing to the company having no address for payment. If the contrary view were correct, a man might by postponing his election for seven years escape all liability to sur-tax when at last the interest was paid. This is not really a case of election but of whether from time to time the respondent decides to require payment of the sum due to him.

The test whether sur-tax is payable is for the present purpose the same as that in regard to income tax, and income tax would be payable under Sch. D, cl. 1 (*b*), which provides: "Tax under this Schedule shall be charged in respect of—(*b*) All interest of money, annuities, and other annual profits or gains not charged under Schedule A, B, C or E. . . . ." This means the annual profits or gains "arising or accruing" which occur in cl. 1 (*a*) and not under cl. 1 (*b*). Tax falls to be charged under Case III., and r. 1 (*a*) of the Rules applicable to Case III. provides: "The tax shall extend to—(*a*) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment . . . . whether the same is received and payable half-yearly or at any shorter or more distant periods." It is important to observe that the words "received and payable" are used and not "received and paid." It is Case V. that contemplates a tax on a sum actually received in the United Kingdom: see r. 2 of the Rules applicable to Case V., and the language may be contrasted. Again in the Miscellaneous Rules applicable to Sch. D, r. 1, it is provided that tax shall be charged on and paid "by the persons . . . . receiving or entitled to the income." Here the respondent is entitled to the income on his legacy and all that has happened is that he has not desired to get into his own hands money to which he is unquestionably entitled. The duty of the Commissioners in these circumstances is to form an estimate of the amount of the income of the taxpayer on which sur-tax is chargeable: see per Romer L.J. in *Inland Revenue Commissioners* v. *Sneath.* (1) For that purpose they must ascertain the income received or to which the subject is entitled, and therefore in this case the interest on the legacy is part of the income chargeable: see *Hawley* v. *Inland Revenue Commissioners* (2) and *Leigh* v. *Inland Revenue Commissioners.* (3) It is not part of the Crown's case that tax must be paid on a debt due from some one without means to pay it; but in the case of a solvent debtor perfectly well able to pay, the debt is taxable.

[They also referred to *St. Lucia Usines and Estates Co.* v. *St. Lucia (Colonial Treasurer)* (4); *Lambe* v. *Inland Revenue Commissioners* (5); *Simpson* v. *Maurice's Executors* (6); *Californian Copper Syndicate* v. *Harris* (7); *Reade* v. *Brearley.* (8)].

Sir Leslie Scott K.C., *A. M. Latter K.C.*, and *Andrewes-Uthwatt* for the respondent.

The Attorney-General has contended that the words "profits or gains arising and accruing" in Sch. D, cl. 1 (*a*), ought to be implied in cl. 1 (*b*) where they do not appear.

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(1) [1932] 2 K. B. 362, 390; 17 Tax Cas. 149, 167.
(2) (1925) 9 Tax Cas. 331.
(3) [1928] 1 K. B. 73.
(4) [1924] A. C. 508.
(5) [1934] 1 K. B. 178.
(6) (1929) 14 Tax Cas. 580.
(7) (1904) 5 Tax Cas. 159.
(8) 17 Tax Cas. 687.

That, however, would be contrary to the practice of the Court in construing taxing Acts. It has always been held that to render a taxpayer liable to tax he must come within the clear words of the taxing Act. See the observations of Lord Sumner in *Ormond Investment Co.* v. *Betts.* (1)

The Attorney-General has ignored the distinction between the accrual of income and the accrual of debt. Here the question is whether there has been any accrual of income, that is, interest on the legacy. The argument for the Crown proceeded on the assumption that the right to interest on the legacy was a right in gross. There can, however, be no income merely because there is a right to it.

There is the further question whether there has been any act of the executors distinguishing income from capital. The income must be defined. Here the money in the hands of the executors has not been separated as between income and capital. The Crown has not here indicated any period of time when the income first became payable.

There must be an actual coming to and receipt by the taxpayer of the income before tax can attach to it.

As Lord Macnaghten, in *London County Council* v. *Attorney-General* (2), said, income tax is a tax on income and is not meant to be a tax on anything else.

In *Inland Revenue Commissioners* v. *Blott* (3) Lord Finlay said: "There can be no super-tax upon income unless it has been received by the taxpayer."

There was no duty on the executors at any particular time to make a payment of interest before the final distribution of the estate. As a debt is not income there was in fact no income and therefore nothing to attract tax.

This case may be decided on either of the two grounds: (1.) unless there is something coming to and received by the taxpayer there is no income; or (2.) unless there is a severance between capital and income there is no accrual of income at all.

It is submitted therefore that as the respondent has not

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(1) [1928] A. C. 143, 158.

(2) [1901] A. C. 26, 35.

(3) [1921] 2 A. C. 171, 195.

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received any interest there has been no income in respect of which he can be taxed.

[They referred also to *Lambe* v. *Inland Revenue Commissioners* (1) ; *Williams* v. *Singer* (2).]

Sir Thomas Inskip A.-G. replied.

LORD HANWORTH M.R. This is an appeal from a decision of Finlay J. upon a Case stated, and the question that has to be determined is whether or not the appellant, that is the appellant under the Case, the respondent in this Court, Mr. John Arthur Dewar, is liable under an assessment in respect of a sum of 40,000*l.* included in an assessment made upon him for a total sum of over 50,000*l.*, 50,180*l.*, for sur-tax in the year ending April 5, 1933. It is important to state what the facts are in this case, because to my mind the case turns upon an appreciation of the exact facts.

Lord Dewar by his will, which was dated in October, 1927, appointed the respondent to the present appeal, Mr. John Arthur Dewar, and Mr. Peter Dewar, to be executors and trustees of his will, and he bequeathed to the respondent, Mr. John Arthur Dewar a sum of 1,000,000*l.* free of legacy duty. Under the will the respondent was also residuary legatee to the extent of two-thirds of the residue of Lord Dewar's estate. Lord Dewar died on April 11, 1930. His will was proved on May 30 of the same year, and what may be called the executor's year expired on April 11, 1931, and from and after that time the executors had to pay the sum of 1,000,000*l.*, the legacy which had come to the respondent, and, as stated in the Case, this legacy carried interest at the rate of 4 per cent. per annum for such time and upon such part of it as remained unpaid. It is perhaps not unimportant to bear in mind that this right to be paid interest is an old established custom. It is not derived under the Statute of William IV., but it is this. In *Wood* v. *Penoyre* (3), decided in 1807, Sir William Grant M.R. said : " Wherever legacies are given out of personal estate, consisting of outstanding securities, those legacies cannot be actually paid, until the money due upon such securities is actually got in : but by a rule, that has been adopted for the sake of general convenience, this Court holds the personal estate to be reduced into possession within a year after the death of the testator. Upon that ground interest is payable upon legacies from that time, unless some other period is fixed by the will." A modern confirmation of that same rule is to be found in *In re Stokes* (1), where it was held that the ordinary rule was that a legacy carried interest only from a year after the death. That is based upon the definite rule which has been adopted now for so long.

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(1) [1934] 1 K. B. 178.
(2) [1921] 1 A. C. 65.
(3) (1807) 13 Ves. 326, 333.

Therefore, the position on April 12, 1931, was that the respondent was entitled to receive his legacy and if and so long as the payment of the legacy or a part of it was in default, he would be entitled to ask for and to receive under that rule interest on the delayed portion of the legacy at the rate of 4 per cent. As a matter of fact, the payments that had been made on account of the legacy were small. During the course of the year 1932–33 the total sum that was paid on account of it was, if my figures are correct, 115,000*l.*, paid in comparatively small sums. There is one cheque of 30,000*l.*, one cheque of 20,000*l.*, one cheque of 28,000*l.*, and the other cheques are all of smaller sums.

On April 14, 1932, the respondent, acting on the advice of his accountant, decided to allow the question of interest on the legacy to stand over, and he has not at any time received any sum in respect of interest thereon. It was stated by his counsel that the respondent at the date of appeal had made no election whether he would or would not claim interest. But in spite of that, in this assessment, which is made upon him for the year ending April 5, 1933, an assessment to sur-tax, he is treated as having received 40,000*l.*, representing the interest on the total value of the legacy delayed for a total time of twelve months. Now in fact the respondent, as is found in the Case, has not received any sum on account of interest on the legacy.

It is claimed that he ought to be subjected to assessment in

(1) [1928] 1 Ch. 716.

respect of 40,000*l.* because the 40,000*l.* was at all material times at his disposal. What exactly does that mean? The respondent in his capacity as legatee could demand from the executors, of whom he was one, that from and after April 12, 1931, the legacy should be paid, and if and when it was not paid he could demand that there should be interest on the aliquot portion not paid or handed over to him. The fact is found that the estate was in a position to pay the interest and I suppose the legacy too. The actual terms of the findings are: "It was admitted that as from 11th April, 1931 (one year from Lord Dewar's death), the appellant [in the Case] was entitled to interest at 4 per cent. on the legacy of 1,000,000*l.* and it was further admitted that the estate was at all material times able to pay the said interest." I pause there, upon these facts, to consider what the position is. The respondent has made, in his capacity as legatee, no demand for the full payment of the legacy, or at the material times he had not, and he has made no demand for payment of interest upon it. He has been quiescent in that: he has occupied a position which is neutral. Ought that 40,000*l.* then to be included in the assessment upon him and on what ground? It is said that it was at his disposal. Now observe the facts. It is not a case in which the legatee, exercising his own volition, has told the executors to put the money into a bank or to hold it in a bank to his use; he has not given any direction of any sort or kind in respect of the 40,000*l.* The money is left in this way, that if he were minded to ask for 40,000*l.*, or a part of it, it would have been possible for him to have been paid and to have received it. But the fact is he has not done anything at all in respect of that, and the money has not been appropriated to his use, it has not been deposited at his direction, and it is not lying under his name, either in the hands of the bank or any other agent.

It is not quite easy to see why this total sum of 40,000*l.* should be claimed, because upon the facts indicated in the table of payments it does not appear that the 40,000*l.* is a sum which would have been payable if the legatee had made a demand, which as I say he has not done. But I pass over

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that entirely and I treat it like this: Can there be a liability to pay sur-tax in respect of this sum not received, not lying to his use or to his order, but in respect of which the Crown say that he should have exercised his powers, and so it is to be treated as at his disposal?

Now I desire to make two observations in reference to income tax and sur-tax generally. As has often been pointed out, if the subject is within a charging section, he must pay; if he is not within the charging section he has not to pay. No doubt there can be cases in which some specious documents have been executed for the purpose of appearing to have effected a disposal of money or property so as to, what is called, evade a tax which ought to be paid. But where there is no such device resorted to, it is not true to say that a man who does not pay is evading the tax. It must be shown that the tax is exigible in the circumstances of the case, and if it is not exigible it is not a case of evasion at all. The words of Lord Halsbury in *Bullivant* v. *Attorney-General for Victoria* (1) make that abundantly plain: "People are not bound to continue in the same condition of things, either as regards their direct or indirect taxation, which will render either the consumption of articles in the one case or the property they have in the other always liable to the tax," and he points out that the word "evasion" is not an accurate word to use with regard to cases where the facts do not bring the charge down upon the subject.

The other observation I want to make is that I adopt the answer which Sir Leslie Scott gave to the proposition advanced by the Attorney-General, that there would be a serious danger in this case, or some other cases, if the charge was held to be non-existing, and that therefore it would be right on the part of this Court to hold, for instance, that the words which are to be found in the Act of 1918, under cl. 1 of Sch. D, "the annual profits or gains arising or accruing," words which are not found in cl. 1 (*b*), ought to be carried over and made applicable to (*b*), although they are not there. Sir Leslie Scott pointed out that if the words are

(1) [1901] A. C. 196, 202.

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not there you cannot, in a taxing Act, bring them forward for the purposes of the Crown. Either in the clear words of a taxing statute the subject is liable, or if he is not within the words he is not liable.

Some observations made in the speech of Lord Sumner in *Ormond Investment Co.* v. *Betts* (1) are relevant upon this point. That was a case in which in this Court we had applied a certain rule, which was applicable to Cases I. and II. of Sch. D, to the rules which are applicable to the receipt of dividends of foreign securities, and we had treated it as analogous. Lord Sumner says (2): " In its express terms this rule applies to trading profits. The contention is that by analogy it can be applied to foreign shares, which are not in themselves stock in trade and the dividends of which are not trading profits. I cannot accept this. The analogy between the date of starting a trade, which is an aggregate of many operations, and the date, when an investor buys a stock to hold, is too remote to be applicable, and in any case the Crown does not tax by analogy but by statute, and there is nothing in the Act which says what is here contended for. It is said that singular results and even a loss of tax will occur on the appellants' contention, and that this cannot have been intended by the Legislature, but it is not for us to say, nor do we know, what the Legislature may or may not have meant, apart from their words, by which we are bound alike to what they say and in what they do not. Words which impose tax in general terms may still receive a particular limitation where the computation rules omit the directions appropriate and indispensable to levying the tax in the particular case." That passage is very important. It supports the view presented by Sir Leslie Scott that you must construe the taxing Act strictly and you cannot apply a doctrine of analogies to it. You cannot impute what you may think the Legislature may or may not have meant; you are bound by the words as to what they have done and what they have not done.

I, therefore, turn to see whether or not the statutes which

(1) [1928] A. C. 143.

(2) Ibid. 158.

apply to sur-tax cover this case upon the facts which I have recounted. I have come to the conclusion, in association with Finlay J., that they do not, and I think Finlay J.'s judgment is right. Sur-tax is the successor of super-tax. Super-tax was originally established by s. 66 of the Finance (1909–10) Act, 1910, which imposed a further income tax called super-tax. When the Income Tax Act of 1918 was passed, ss. 4 and 5 imposed the super-tax: "In addition to the income tax charged at the rate prescribed for any year," so runs s. 4 of the Act of 1918, "there shall be charged, levied, and paid for that year in respect of the income of any individual, the total of which from all sources exceeds 2000*l.*, an additional duty of income tax (in this Act referred to as super-tax)," and (s. 5, sub-s. 1) "For the purposes of super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is required to be estimated in a return made in connection with any claim for a deduction from assessable income." That is how super-tax originated.

Now we have its successor, sur-tax, and the plan of sur-tax enabled a single return to be made which could be used for the income tax and for the sur-tax. The result is that by the Finance Act of 1926 there were modifications made in the matter of the super-tax, and by the Finance Act, 1927, we have the first reference and imposition of what is called sur-tax. In Part III. of the Act of 1927, s. 38, sub-s. 1 (*b*), a reference is made to the same system, namely of income being above a certain standard rate, and in that case—I am reading it quite shortly—if the total income of the individual "is greater than the amount which would have been payable by him in respect thereof if income tax had been chargeable at the standard rate only, the difference between those two amounts (in this Part of this Act referred to as 'sur-tax') shall be computed, assessed, charged, collected and paid as a deferred instalment of income tax according to the provisions of this Part of this Act relating to sur-tax." In its essence, therefore, whether it is super-tax or sur-tax, it is a deferred instalment of income tax, and it is to be assessed, charged, collected and paid as an instalment, but a deferred instalment, of income tax.

Now, under s. 100 of the Income Tax Act, 1918, provision is made that there shall be a return made by "every person chargeable under this Act," and the correct statement in writing is to contain "the amount of the profits or gains arising to him, from each and every source chargeable according to the respective schedules." Observe that the section says "arising to him." If the interest on the legacy in this case has not arisen to the respondent, if he has not become the dominus of this sum, if it does not lie to his order in the hands of his agent, can it be said that it has arisen to him? I think the answer definitely upon the facts must be: No, it has not. Then "the amount of the profits or gains arising to him according to the provisions and rules of this Act." I turn, therefore, to Sch. D to see what is charged by that Schedule. Schedule D under cl. 1 (*a*) deals with annual profits or gains arising or accruing from any kind of property whatever, whether situate in the United Kingdom or elsewhere, but the clause goes on under (*b*) to say that the tax under this schedule shall be charged in respect of "all interest of money, annuities, and other annual profits." This is undoubtedly interest of money and therefore falls under cl. 1 (*b*) and not under cl. 1 (*a*). Clause 1 (*b*) does not contain, as I have already pointed out, the words "profits or gains arising or accruing," and following the direction of Lord Sumner, I am quite unable to introduce those words into cl. 1 (*b*).

Then under cl. 2 we have that general direction broken up into the various Cases, and the suitable Case in respect of this sum is Case III.: "Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case." One turns, therefore, to the rules applicable to this Case and one finds the rule is r. 1: "The tax shall extend to—(*a*) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment," and so on, " or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods." Now I think the words " received and payable " there are cut down by the words " half-yearly or at any shorter or more distant periods." The word " payable " there does not mean: if you like to put out your hand and ask for the money it will then be payable to you; it is dealing with a sum which, whether yearly or otherwise, is in fact received, whether it is payable and in fact received half-yearly or at any shorter or more distant periods. That is the rule which applies here. Can it be said here that there has arisen a personal debt or obligation? Something more is required than the mere fact that there is a capacity on the part of the estate to pay the money if it should be demanded. The rule does not say, and it cannot be said, that there is a debt when there has been no demand.

Now I turn on to Case IV. for the purpose of illustrating by way of contrast what is provided and laid down in the case of income tax. Case IV. relates to income arising from securities out of the United Kingdom, and you find in r. 1 of the rules applicable to that Case: " The tax in respect of income arising from securities in any place out of the United Kingdom shall be computed on the full amount thereof arising in the year of assessment, whether the income has been or will be received in the United Kingdom or not." There are further provisions which have been enacted for dealing with the situation which arose—namely, a practice which obtained whereby persons who were entitled to dividends or income arising from securities situate abroad gave a direction that those dividends or income should be paid to an agent or bank abroad and left there. The sums were at their disposal, they were had and received to their use, but they were not brought over to this country in the hope thereby of escaping the tax which would have fallen upon them. But there is in this rule—and there are other provisions—something which has prevented that device from succeeding and has made the person who is liable to make the return for the purposes of income tax and sur-tax include in that return sums which are lying at his disposal, whether the income or dividend has been remitted to this country or not. But so far one has not found anything in Sch. D or the Cases or rules under it which says that a sum of money which is not a debt and has not been received and is not in the hands of an agent, is to be taxable.

Case V. also deals with profits or gains not falling under any of the foregoing Cases, and it is complementary to Case IV. But I will not dwell upon that, because it is complementary to the system of Case IV. and does not require separate treatment.

In the Miscellaneous Rules applicable to Sch. D, r. 1 provides: "Tax under this Schedule shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under this Schedule is hereinbefore directed to be charged." Some emphasis is placed upon those words "entitled to." When all conditions have been fulfilled it may be treated as his income. But the words are sufficiently fulfilled by your treating the "receiving" as applicable to the money which has been paid over to the subject, and "entitled to" means moneys which the subject has at his disposal but which have not at the present time been remitted from another country to him. It appears to me that there is no emphasis to be placed either one way or the other upon that.

Then reference is made to the declaration under No. XVII. of Sch. V to the Act of 1918. There there is required to be made by the subject "First. Declaration of the amount of value of property or profits or gains returned, or for which the claimant has been, or is liable to be, assessed. Second. Declaration of the amount of rents, interests, annuities, or other annual payments, in respect of which the claimant is liable to allow the tax, with the names of the respective persons by whom such payments are to be made . . . ."— that gives information to the Revenue Authorities—and, "Third. Declaration of the amount of interest, annuities, or other annual payments to be made out of the property

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or profits and gains assessed on the claimant . . . . "; and, fourthly, the ultimate statement, when those steps have been gone through indicated in the first, second and third declarations, of the amount of income derived according to the three preceding declarations. I do not stop to dwell upon the actual machinery sections, but those are the sections which are material for the return by the subject of moneys which are subject to, or caught by, or rendered chargeable to income tax or sur-tax, and in none of those do I find the apt words to deal with this sum which has not yet been reduced at least into possession, and which is not a matter of a dividend arising from a foreign possession.

The matter is not without some guidance from authority. In *Inland Revenue Commissioners* v. *Blott* (1) there is a statement by Lord Finlay where he says: " There can be no super-tax upon income unless it has been received by the taxpayer." Then he quotes the passage from Pitney J. in *Eisner* v. *Macomber*. (2) No doubt those words must be taken in relation to the whole paragraph. It could not be taken as an exhaustive statement because there can be super-tax on some sum which has not been actually received into the pocket over here of the subject, but which is received in this sense that it is under his control and standing in his agents' hands. But it is plain, from the whole passage, that Lord Finlay is seeking first to find out whether there has been in any case a sum actually received or potentially received in the sense that it is at the disposal of the subject. In *Simpson* v. *Maurice's Executors* (3) there is a passage about what I have said before: " The facts must be taken as they are in truth and in substance; then, if income tax attaches, it can be recovered: but if it does not attach then the income tax is lost from it," and you cannot torture the facts in order to see how the aliquot part of it can be received by the Crown.

In *St. Lucia Usines and Estates Co.* v. *St. Lucia* (*Colonial Treasurer*) (4) Lord Wrenbury applied a test, and says:

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(1) [1921] 2 A. C. 171, 195.

(2) (1920) 252 U. S. 189, 207.

(3) 14 Tax Cas. 580, 601.

(4) [1924] A. C. 508, 512.

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" The words ' income arising or accruing ' "—words which we have not got in the present case—" are not equivalent to the words ' Debts arising or accruing.' To give them that meaning is to ignore the word ' income.' The words mean ' money arising or accruing by way of income.' There must be a coming in to satisfy the word ' income '." Again those words must be taken in their true sense, because that is not an exhaustive definition of what is taxable under an Income Tax Act. Profits and gains are taxable, although they do not in the true sense come in. The profit and gain which arises from the occupation of property, and which falls under Sch. A, is subject to income tax although there is not something actually coming in but there is something enjoyed, and that is the gain which is covered by the tax. Nor is it literally true to say what Lord Macnaghten says in *London County Council* v. *Attorney-General* (1), words which have been often quoted and misquoted. Lord Macnaghten is dealing in that case with the proposition which was made by the then Attorney-General, that income tax could be a tax upon capital. The Attorney-General had said that it is a tax not only on income but on capital, and Lord Macnaghten, answering that, said that income tax is a tax on income and not meant to be a tax on anything else. Again that is not intended to be an exhaustive definition and must be treated in the sense in which it is used. But all those observations tend in this direction, that you must find something which is in the enjoyment of the subject. He could make use of the money which lies abroad to his use. It is in that sense in his enjoyment. Upon the present facts there is no enjoyment by him, there is no gain by him, he has derived no profit and there is nothing in his hands which will answer the test of what you mean by " income."

Then I come to *Leigh* v. *Inland Revenue Commissioners* (2), in which Rowlatt J., whose experience and knowledge of the Income Tax Acts is quite unrivalled, says: " It is to be remembered that for income tax purposes ' receivability ' without receipt is nothing. Before a good debt is paid there

(1) [1901] A. C. 26, 35.

(2) [1928] 1 K. B. 73, 77.

is no such thing as income tax upon it." I agree with those words. It appears to me that the reason why you make up the return for the particular year is that you look to see in the course of that twelve months what has been received, and it may be that a good debt will be paid in a subsequent twelve months and not in the twelve months in respect of which you are making your declaration, and you cannot anticipate that the money will come in in its proper place in the following twelve months. I think Rowlatt J. was right in saying that for income tax purposes receivability without receipt is nothing.

Finally, with regard to *Lambe* v. *Inland Revenue Commissioners* (1) I do not want to say anything about that case. If the subject had in any way intervened so as to say what was to be the disposal of this sum, he would have become liable to tax. You cannot, by the use which you make of a sum which has been received or which has come into your disposal, escape tax. But the truth here is that upon the facts there has been no receipt and there has been no disposal by the respondent of this sum of money. There are no apt words in respect of that which would fit the case, and I cannot mould or adapt the words which do not exist in the relevant sections from sections where they do exist so as to make the subject liable to this sum. The truth of the matter is that it either falls within the table which is to be returned of sums which he has received and in respect of which he is liable to tax, or it does not, and upon the facts of this case it does not fall within that table and therefore I have come to the conclusion that tax is not exigible and the decision of Finlay J. is right and the appeal must be dismissed with costs.

ROMER L.J. I have come to the same conclusion.

For the purposes of this case, it does not appear to me to be necessary to ascertain the origin or the precise nature of a legatee's right to receive interest on an unpaid legacy as from the expiration of one year from the testator's death.

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(1) [1934] 1 K. B. 178.

I am perfectly willing to approach this case on the footing that Mr. Dewar had a sum of 1,000,000*l.* owing to him upon which interest was payable at the rate of 4 per cent. per annum as from April 11, 1931. The question which has to be determined in those circumstances is whether, no such interest having, in fact, been paid to Mr. Dewar or placed at his disposal—Mr. Dewar contemplating the possibility, though he has not definitely made up his mind about it yet, of releasing his debtor altogether from the claim to interest —he is nevertheless assessable to sur-tax in respect of such interest.

Now sur-tax, as the Master of the Rolls has pointed out, as distinct from super-tax, was first heard of when the Finance Act of 1927 was passed. I do not intend to read the relevant sections of Part III. of that Act. It is sufficient to say that no item of property is assessable to sur-tax in any year unless income tax at the standard rate could be claimed in respect of that item of property for that year. So that the question to be determined on this appeal is whether, in respect of the interest for the year ending April 5, 1933, Mr. Dewar, I will not say became liable to be assessed because in no case would he be liable to be assessed, as I understand the law, but whether interest for that year became liable to income tax at the standard rate. If it did it must be by virtue of Sch. D, cl. 1 (*b*), of the Income Tax Act, 1918— namely, as being interest of money. Clause 1 (*b*) of Sch. D does not of itself throw any light upon the question of what interest of money is brought into tax, nor is any further light thrown on that subject by cl. 2 of the Schedule which contains the Cases under which tax under the Schedule is to be charged. The particular Case that applies here, if the Schedule applies at all, is Case III. : " Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case." It is not until you come to look at the rules applicable to the Case that light is thrown upon the question of what interest is chargeable under Sch. D, cl. 1 (*b*).

Rule 2, sub-r. 1, of the Rules applicable to Case III. is as follows : " The tax shall, subject as hereinafter provided, be computed—(*a*) as respects the year of assessment in which the profits or income first arise, on the full amount of the profits or income arising within that year; and (*b*) as respects subsequent years of assessment, on the full amount of the profits or income arising within the year preceding the year of assessment." Interest, therefore, for any year of assessment is not taxable under Sch. D, unless it can be properly described as being "profits or income arising within that year," or the preceding year as the case may be.

Now we are not without assistance from the authorities upon the question as to what is income. I will not read the passages with which the Master of the Rolls has already dealt, with the exception of the statement made by Lord Wrenbury in the *St. Lucia* case. (1) He is dealing with the meaning of the word "income" and he says: "The words 'income arising or accruing' are not equivalent to the words 'debts arising or accruing.' To give them that meaning is to ignore the word 'income.' The words mean 'money arising or accruing by way of income.' There must be a coming in to satisfy the word 'income.'" Much to the same effect was said by Rowlatt J. in *Leigh's* case (2), and Lord Finlay in *Blott's* case (3), and Finlay J. in *Lambe's* case. (4) Has there been a coming in of interest for the year ending April 5, 1932? Assuredly there has not. That being so, it appears to me that the interest for that year is not brought into tax by Sch. D.

Now it is said, and said truly, that it has not been received by Mr. Dewar or placed at his disposal owing to his voluntary act or omission; that is to say, the interest has not been paid, not because the debtor cannot pay it but because Mr. Dewar has not thought fit to ask for payment, and further has intimated the possibility of his releasing the debtor altogether from payment of that interest. But for the purposes of income tax, one does not take an account of income on the footing of wilful default. The question is what income the subject has received, and not what income he has received or but for his wilful default might have received. The truth of the matter is that no one owes a duty to the State to maintain his assessment for sur-tax at the highest possible figure. If a subject thinks proper so to do, he assuredly may get rid of an income-bearing security for the purposes of avoiding the addition of the income from that security to his assessment for sur-tax purposes. That is admitted. A tenant for life, if he thinks fit, may surrender his life interest. If he does so, most assuredly he does not remain liable to be assessed to income tax in respect of the income which he has surrendered, and I for myself can see no reason why a subject should not, if he thinks fit, retain the capital of an income-bearing fund and release his right to receive the income, either for one year or two years or altogether. If he does so, in my opinion he does not receive the interest and cannot be assessed for sur-tax in respect of it.

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(1) [1924] A. C. 508, 512.
(2) [1928] 1 K. B. 77.
(3) [1921] 2 A. C. 171, 195.
(4) [1934] 1 K. B. 178.

For those reasons, it seems to me the learned judge arrived at a right conclusion in this case and this appeal must be dismissed with costs.

MAUGHAM L.J. I am of the same opinion and will add only a few words in reference to the case. First I desire to say that I do not want, in what I am going to add, to intimate a doubt as to the correctness of what has fallen from my brother Romer on the more general propositions. I propose in a few words, if I can, to explain the grounds on which I think, without going quite so far, the judgment of the learned judge can be supported.

We are dealing here with a claim for sur-tax for the year ending April 5, 1933, and I think it is beyond dispute that the claim is based on a claim of right to tax levied under Case III. of Sch. D. The sum involved is a large sum of 40,000*l.* interest said to be due in respect of a pecuniary legacy of 1,000,000*l.*

Now for my part I attribute some importance to the fact that Mr. Dewar cannot be compelled to receive interest on that legacy. The legal position, as explained in the rather quaint language of Sheppard's Touchstone at pp. 284 and

285, is that the law will not compel a man to take property bequeathed to him by will against his will. I conceive that there is no doubt that in the case of pecuniary legacies the legatee is entitled to disclaim part of the legacy, if he likes, and to disclaim in particular the interest on the legacy, being a pecuniary legacy, if he so wishes. The disclaimer may be inferred from the conduct of the party, and it certainly may arise from a parole statement by the legatee, and no release under seal, or anything of that sort, is required in such a case.

Having said that by way of preface, I want to observe that the standard of the assessment varies according to the source from which the taxable income is derived, and that we are not dealing here with a case (which might well have a different result) where the interest is payable in respect of a foreign possession, because in that case there are exceptional words. The point that arises here is whether the principle which is to be derived from such cases as the *St. Lucia Estates* case (1) *Lambe* v. *Inland Revenue Commissioners* (2); and I will add *Leigh* v. *Inland Revenue Commissioners* (3)—does not apply to such a case as the present, for the reason given by the Commissioners for Special Purposes, that there has been no default in payment. For my part, I accept the view that there has been no default in payment, but I understand the finding in para. 11 (5.) of the Special Case " the appellant has for the present for reasons of his own voluntarily waived his right to receive the payment of interest," as meaning no more than this, that he has not claimed such interest.

For the reasons given, in particular by the Master of the Rolls, who has dealt with those authorities in some detail, I am of opinion that the cases were correctly decided and that they do not depend or relate solely to cases where there has been a default in payment by a debtor. I think they have a wider range than that and include cases where the debtor, if there is a debtor, has for some reason other than default,

(1) [1924] A. C. 508.
(2) [1934] 1 K. B. 178.
(3) [1928] 1 K. B. 73.

and without any act on behalf of the creditor which might be alleged to amount to an exercise of dominion over the debt, has not in fact paid the sum of interest in question during the year of assessment.

As I have said, I do not want to elaborate what has already been said in the cases. I accept as correct the judgment of Finlay J. in *Lambe's* case (1) and for the reasons he there states. (2) I accept the decision of Rowlatt J. in *Leigh* v. *Inland Revenue Commissioners* (3) as also being correct for the reasons he there gave. I do not regard those decisions as limited to cases where there is a debt and the debtor has committed default. I think in the present case two circumstances may be accurately stated in regard to the sum of 40,000*l.* which it is said can be brought into charge. The first is that the sum of 40,000*l.* was not during the year of assessment a debt due by the executors to Mr. Dewar, and secondly, that the sum in question may never be paid or received at all.

In those circumstances, I think the decisions, which I follow, afford a sufficient reason for the dismissal of the present appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Jacobson, Ridley & Co.*

(1) [1934] 1 K. B. 178.
(2) Ibid. 182 to 186.
(3) [1928] 1 K. B. 77.

W. I. C.

TERRITORIAL ARMY ASSOCIATION FOR THE COUNTY OF DERBY *v.* ASSESSMENT COMMITTEE FOR THE SOUTH EASTERN AREA OF THE COUNTY OF DERBY AND ANOTHER.

1935
May 13.

Rates—Exemption—Crown property—Territorial Army drill hall—Occasional user for dances—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 64, *sub-s.* 3 (*a*)—*Territorial and Reserve Forces Act,* 1907 (7 *Edw.* 7, *c.* 9), *ss.* 1, 2, 3—*Territorial Army Regulations,* 1929, *Reg.* 904.

The Rating and Valuation Act, 1925, s. 64, sub-s. 3, provides: "Where any hereditament is occupied by or on behalf of the Crown for public purposes—(*a*) no gross value shall be determined or entered in the valuation list in respect of the hereditament."

A drill hall erected by a county Territorial Army Association for the use of a local company of that army was regularly used for the ordinary military purposes for which it was provided. The hall was, however, also used each Saturday night during the winter for dances organized by the officer commanding the company, to which members of the company with their wives and fiancées were admitted free and the public on payment of 6*d.* each, and the profit after payment of expenses was distributed for the benefit of the members of the company or their dependants, the purpose of the dances being to keep the men of the company together during the winter and to stimulate recruiting.

It was contended by the rating authority that the above statutory provision should be construed as if, in accordance with the previous state of the law, the word "exclusively" was inserted therein immediately before the word "occupied," or at least as if the word "where" at the beginning of the provision meant "in so far as" or "to the extent to which," and that in view of the user of the hall for the dances it came, consistently with one or other of these respective constructions, either not at all or not entirely within that provision and was therefore either wholly or partially rateable:—

Held, that the provision must be construed according to the natural meaning of its words without regard to the previous state of the law, that none of the constructions contended for could be supported, and that the hall came wholly within the provision; that, even if one or other of the proposed constructions was the true construction, the hall was in the circumstances exclusively occupied on behalf of the Crown for public purposes and would come within the provision; and consequently that the hall was entirely exempt from rates.

Bank of England v. *Vagliano Brothers* [1891] A. C. 107, 144; and *Bristol Tramways, etc., Carriage Co.* v. *Fiat Motors, Ld.* [1910] 2 K. B. 831, 836, observations applied.

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CASE stated by quarter sessions for the county of Derby.

In 1929 the Territorial Army Association for the county of Derby purchased a piece of land in the borough of Ilkeston in that county and erected thereon a drill hall and premises for the use of the local company of the Territorial Army—namely, "B" company, 5th battalion of the Sherwood Foresters. The premises comprised (i.) a two-storey building consisting of living accommodation for the residential sergeant instructor, an orderly room, armoury, lavatories, bar, recreation room, and store room, and (ii.) behind these premises an inclosed yard and a one-storey building comprising a rifle range and drill hall. The hall was erected for and was regularly used for military purposes. Between February and October drills were held twice weekly at night and also twice weekly in the morning, and between October and February lectures were delivered there at frequent intervals. It was used in the evening for recreation by the company. Up to the end of January, 1932, the drill hall had been occasionally hired to outside bodies, but not since that date.

Since 1930, after the opening of the new drill hall, the officer commanding the local company had organized dances at the hall which were held on Saturday in each week during the winter months. Up to 1932 the dances were publicly advertised, but since that year they had not been advertised, knowledge of the forthcoming dances having been obtained through the men of the company telling their friends. Members of the local company with their wives and fiancées were admitted free to those dances and the public were also admitted on payment of 6*d*. each. On an average about 150 persons attended these dances, two-thirds of whom were non-members who paid for admission. The master of ceremonies was not a member of the Territorial Army, but stewards who were members were employed, and both these stewards and the master of ceremonies were paid out of the proceeds. The stewards were not detailed for duty by their military superior, and the work was not treated as part of their military duty. Refreshments were supplied at the dances by the sergeant instructor's wife, who retained the profits, if any, resulting from the sale. The takings from these dances were under the control of the officer commanding and were paid into the account for the benefit of the company and not into the funds of the association. After payment thereout of the expenses the balance of profit was disbursed by him in various ways for the benefit of the men of the company or their dependants. The profits were: in the year 1930–31, 5*l.*; in 1931–32, 105*l.*; and in 1932–33, 30*l.* For any loss incurred the officer commanding the company and not the association would have been responsible. A music and dancing licence in respect of the premises had been granted to the officer commanding the company since 1928. The commanding officer or the sergeant instructor was in charge when the dances were taking place. Undesirable persons were refused admission.

In 1932 the assessment committee for the south-eastern assessment area of the county of Derby, on the proposal of the rating authority for the borough of Ilkeston in that area, allowed an amendment of the valuation list by inserting therein an assessment of the premises, that assessment being 45*l.* gross and 35*l.* rateable and operating as from April 1, 1932. Rates were paid on this assessment up to December 31, 1932. In April, 1933, a proposal to amend the valuation list by deleting this assessment was made by the association. On October 26, 1933, the assessment committee disallowed the proposal that the property was not rateable, but reduced the assessment to 27*l.* gross and 20*l.* rateable.

The association gave notice of appeal dated November 14, 1933, to quarter sessions against the decision of the assessment committee, the notice being directed to the assessment committee and the rating authority.

On April 6, 1934, that appeal came on for hearing when the above mentioned facts were proved or admitted.

On the part of the association it was contended: (1.) that upon these facts the hereditament was occupied by servants of the Crown exclusively for Crown purposes, (2.) that upon these facts it was not properly rateable in respect of the user for the dances by reason of the Rating and Valuation

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Act, 1925, s. 64, sub-s. 3 (*a*), and the Regulations for the Territorial Army, 1929, reg. 904, (3.) that the user for the dances was a user for military purposes by reason of the fact that the purpose of the dances was to keep the men of the company together during the winter months and to stimulate recruiting.

On the part of the assessment committee and the rating authority it was contended: (1.) that upon these facts the hereditament was not occupied by servants of the Crown exclusively for Crown purposes, (2.) that upon these facts it was properly rateable in respect of the user for the dances.

Quarter sessions were of opinion that the premises were under the control of the Crown and exclusively used for military purposes and were therefore not rateable.

Notice of appeal was directed to be served upon the clerk of the peace, county offices, Derby; the south eastern area assessment committee of the county of Derby; and the clerk to the Ilkeston rating authority.

The question for the Court was whether upon the facts above stated the association were liable to be rated in respect of the premises.

Montgomery K.C. and *Trustram Eve K.C.* for the assessment committee and the rating authority.

The court of quarter sessions was wrong in holding that the respondent Territorial Army Association are not liable to be rated in respect of the drill hall in question. The Rating and Valuation Act, 1925, s. 64, sub-s. 3, provides: " Where any hereditament is occupied by or on behalf of the Crown for public purposes—(*a*) no gross value shall be determined or entered in the valuation list in respect of the hereditament." That provision should be construed as if the word " exclusively " was inserted immediately before the word " occupied." Before the passing of the Act of 1925 premises were not exempt from rates on the ground that they were used for the service of the Crown unless they were exclusively so used: *Worcestershire County Council* v. *Worcester Union* (1); and per

(1) [1897] 1 Q. B. 480.

Lord Cairns L.C. in *Greig* v. *University of Edinburgh* (1); and in construing the Act regard should be had to the state of the law at the time when the Act was passed. If that be the true construction of the provision it does not exempt the association from rateability in respect of this drill-hall because it has not been exclusively used for the service of the Crown. The user of property vested in the association which is user for the service of the Crown appears from the Territorial and Reserve Forces Act, 1907, which provides (s. 1) that county associations shall be constituted for the purpose of the reorganisation of His Majesty's military forces other than the regulars; (s. 2) that the powers and duties of an association may include, inter alia, the organization of the units of the Territorial Force and their administration, the recruiting for that force, the provision of rifle ranges and buildings for that force, and of accommodation for the safe custody of arms and equipment; (s. 3) that an association shall submit to the army council a statement of its necessary requirements, and that all payments to an association by the Army Council shall be made upon the basis of such statement so far as approved; and that all money so paid to an association shall be applicable to the purposes specified in the approved statements, but not otherwise except with the written consent of the Army Council: Provided that nothing in the section shall be construed as enabling the army council to give consent to any purpose to which, apart from the section, it could not lawfully be applied. The Territorial Army Regulations, 1929, were made under that Act. Reg. 904 thereof provides that property vested in or held by an association and used exclusively for the purposes of the Territorial Army is exempt from rating; and in so providing it merely reaffirms the common law. The regulation then goes on to provide that, where associations are improperly assessed for rates, steps will be taken to give notice of objection to the assessment committee, and if necessary, to appeal from that committee; but that provision is ultra vires the Act of 1907, and is therefore of no effect. It appears from the Act of 1907 and the Regulations thereunder that the association exists solely for effecting certain definite military purposes on behalf of the Crown, that all property vested in it is so vested only for these purposes, and that money paid to it is to be applicable to these military purposes and to no other purposes. If the use of the drill hall here in question had been confined to these purposes it would undoubtedly have been exclusively occupied on behalf of the Crown for public purposes under s. 64, sub-s. 3 (*a*), of the Act of 1925 and would have been exempt thereby from rating; but, having been used from time to time for the dances described in the case, it was not exclusively so occupied, and therefore it is not exempt from rating.

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(1) (1868) L. R. 1 H. L. Sc. 348, 350.

[BRANSON J. It has been laid down by Lord Herschell in *Bank of England* v. *Vagliano Brothers* (1), and by Cozens-Hardy L.J. in *Bristol Tramways, etc., Carriage Co.* v. *Fiat Motors, Ld.* (2) that in construing a statute the proper course is to examine its language and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law. If that be so, ought not the language of s. 64, sub-s. 3 (*a*), of the Act of 1925 to be construed without regard to the previous state of the common law?]

If the word "exclusively" ought not to be read into s. 64, sub-s. 3 (*a*), of the Act of 1925, then, at any rate, the word "where" at the beginning of the clause should be read as meaning "in so far as" or "to the extent to which," and the clause should be construed as enacting that the hereditament is exempt from rates only in so far as it is occupied by or on behalf of the Crown for public purposes, and no further. According to that construction this drill hall would not be exempt from rates in so far as it was used for purposes other than Crown purposes. The hall in so far as it was used for these dances was not used for Crown purposes. Its user for dances is not sanctioned by the Act of 1907, and was not a user of it for military purposes. The expense of the dances was not borne by or on behalf of the Crown, and the takings from them were not paid into the funds of the association.

(1) [1891] A. C. 107, 144, 145. (2) [1910] 2 K. B. 831, 836.

The hall was used for these dances every Saturday during the winter months, and its user for these purposes thus formed a considerable part of its user for all purposes during the year. Sect. 64, sub-s. 3 (*a*), of the Act of 1925 contemplates that a hereditament occupied by or on behalf of the Crown may be rateable. In expressly providing that no gross value of the hereditament shall be inserted in the valuation list it provides by implication that a rateable value of the hereditament may be there inserted. In many cases in which it might have been contended that property was exempt from rates as being occupied for Crown purposes the Crown has nevertheless seen fit to make a contribution towards the rates.

Wilfrid Lewis for the Territorial Army Association.

The decision of the court of quarter sessions was right. Sect. 64, sub-s. 3 (*a*), of the Rating and Valuation Act, 1925, should be construed according to its actual terms, namely, " Where any hereditament is occupied by or on behalf of the Crown for public purposes " it shall not be rateable. Assuming that the drill hall of the association when actually used for the dances in question was not being occupied by or on behalf of the Crown for public purposes, the fact that it was so used only once a week during the winter months did not prevent it from being occupied on behalf of the Crown for public purposes within the meaning of the clause. There is no reason for reading into the clause the word " exclusively," or the words " in so far as " or " to the extent to which." If at common law property was only exempt from rating as property occupied by or on behalf of the Crown when it was " exclusively " so occupied, the fact that the clause omits that term shows that the intention was to alter the law so as to exempt Crown property from rating notwithstanding some slight user for purposes other than Crown purposes, such as the user of this drill hall for these dances. If the term " exclusively " is to be read into the clause, then the user of the hall for these dances did not prevent it from being exclusively used on behalf of the Crown, because these dances were organized and held for the military purposes of keeping the members of the company together and of stimulating recruiting for the force.

LORD HEWART C.J. This is a case stated by the court of quarter sessions for the county of Derby, and it raises a point in regard to the rating of a particular drill hall. In the court below the Territorial Army Association for the county of Derby appealed with success against the decision of the assessment committee disallowing an amendment of the valuation list for the borough of Derby whereby the drill hall was assessed in certain sums as representing its respective gross and rateable values. The question for the Court is whether upon the facts of the case and the true view of the law applicable to it the quarter sessions were right in holding that the hereditament mentioned was not rateable.

[His Lordship stated the material facts and the contentions of the parties substantially as above set out, and thereupon continued as follows :]

In these circumstances it seems to me that the decision at which the court of quarter sessions arrived, so far from being wrong in point of law, as contended on behalf of the assessment committee, was manifestly correct.

It is to be observed in the first place that the law now applicable in cases such as this is contained in the Rating and Valuation Act, 1925. By s. 64, sub-s. 3, of that Act it is provided : " Where any hereditament is occupied by or on behalf of the Crown for public purposes—(*a*) no gross value shall be determined or entered in the valuation list in respect of the hereditament," and the sub-section proceeds to provide that within certain limits there may be a rateable value. It has been contended on behalf of the assessment committee that, although the word " exclusively " does not occur in that sub-section, we ought nevertheless to construe the sub-section as if its express terms were " Where any hereditament is exclusively occupied by," or, at all events, that we should construe it as if its terms were " To the extent to which any hereditament is occupied by." The only argument which is adduced for the interpolation of that word or of these words into the sub-section is that otherwise the Act would alter the law as it previously existed. Sometimes an Act of Parliament does alter the law, and I am not prepared to assume that in the year 1925, after what had happened in preceding years, the Legislature was not intending to alter the law in certain respects. I may refer to passages from two cases, which have been already mentioned, one of them a very well known case. In *Bank of England* v. *Vagliano Brothers* (1) a question arose as to the true meaning of a part of s. 7 of the Bills of Exchange Act, 1882. In delivering his opinion in the House of Lords in that case Lord Herschell, after stating that it had appeared to the judges of the Court of Appeal that they might well pause before holding that the provision there in question was intended not merely to codify the existing law but to alter it, then went on to say: " My Lords, with sincere respect for the learned judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view." (2) Twenty years later, in *Bristol Tramways, etc., Carriage Co.* v. *Fiat Motors, Ld.* (3), Cozens-Hardy M.R. said, with reference to another statutory provision: " The case really turns upon s. 14 of the Sale of Goods Act, 1893. I rather deprecate the citation of earlier decisions. . . . . The object and intent of the statute of 1893 was, no doubt, simply to codify the unwritten law applicable to the sale of goods, but in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law." (1) On the authority of such passages as these, and indeed, on the ground of common sense, I am not at all prepared to hold that s. 64, sub-s. 3, of the Act of 1925 should be read either as if its words were "Where any hereditament is exclusively occupied by," or as if they were "To the extent to which any hereditament is occupied by." The fact that in the sub-section the word "exclusively" does not occur before the word "occupied" appears to me to be rendered the more significant by reason of its having been the rule of the common law before the passing of the Act that exclusive occupation of the hereditament for the purposes of the Crown was requisite.

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(1) [1891] A. C. 107.
(2) Ibid. 144.
(3) [1910] 2 K. B. 831.

But a further argument on behalf of the association, on which it is evident that they relied also in the court below, was that even if the matter were treated as if the test were exclusive occupation for Crown purposes, this case would come within the exemption. Why? First, because the drill hall, although occasionally used for the purpose of dances, was commonly used for the ordinary purpose of a drill hall; and, secondly, because, if the dances were examined, it appeared that the main purpose of them was to keep the members of the company together during the winter months and to stimulate recruiting. In other words, the very use of the hall which was said to be non-military proved on analysis to be essentially military.

It therefore seems to me that as well on the facts as on the law the decision of the court of quarter sessions was right and should be affirmed.

I am not in the least saying that it follows that, if Mr. Montgomery's view as to the true construction of the sub-section is wrong, the occupation of a hereditament by the Crown would secure its exemption from rates, in spite of any form of use to any extent that might be made of it. The question would always remain whether the hereditament was occupied by or on behalf of the Crown for public purposes within the meaning of the sub-section, and in order to answer that question in any particular case regard must of course be had to the real purpose for which the hereditament was occupied. But that is not to say that the sub-section ought to be construed as if the word "exclusively" had been included in it.

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(1) [1910] 2 K.B. 836.

On these grounds it seems to me that the appeal fails and should be dismissed.

AVORY J. I am of the same opinion. In view of the contention of the association as set out in the case stated that the purpose of the dances was to keep the men of the company together during the winter months and to stimulate recruiting, and of the fact that the court of quarter sessions adopted that view in expressing their opinion that the premises were under the control of the Crown and exclusively used for military purposes, I agree that the terms of s. 64, sub-s. 3, of the Rating and Valuation Act, 1925, govern the present case. In view of those findings it is not necessary, as otherwise it would have been, to examine the question whether the premises could have been exempt from rates consistently with the principle of the common law which undoubtedly involved occupation of the premises for the exclusive use of the Crown.

As regards the Act of 1925, I will only add that its title, which I will read, is more consistent with its being an amending than a consolidating Act: "An Act to simplify and amend the law with respect to the making and collection of rates by the consolidation of rates and otherwise, to promote uniformity in the valuation of property for the purpose of rates, to amend the law with respect to the valuation of machinery and certain other classes of properties, and for other purposes incidental to or connected with the matters aforesaid." The Act is thus essentially an amending Act.

A further difficulty for the assessment committee arises from the mode in which they arrived at the rateable value of the hall. It appears from the case that the assessment was based upon the rent reasonably to be expected from year to year from a tenant using the premises for such purposes

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as those of dances and ignored any value attributable to military purposes. I find it difficult to imagine a hypothetical tenant of such premises using them for the purposes mentioned as a yearly tenant when he might at any time be forbidden to have dances on the premises.

On these grounds I agree that the appeal should fail.

BRANSON J. I concur in the view which has been expressed by my Lord. It seems to me that s. 64, sub-s. 3, of the Rating and Valuation Act, 1925, is a complete answer to the claim of the assessment committee in the present case. If it be observed that that Act is not merely a codifying Act but also an amending Act, the argument adduced from *Bank of England* v. *Vagliano Brothers* (1) and *Bristol Tramways, etc., Carriage Co.* v. *Fiat Motors, Ld.* (2) becomes a fortiori, because what was said there with regard to Acts which were merely codifying the law applies with still greater force to an Act which expressly aims at amending the law. The argument that regard should be had to the state of the law before the Act was passed and assume it to have been altered as little as possible applies less strongly to an Act which is intended and expressed to be an amending Act than to an Act which is merely codifying the existing law, yet the authorities to which my Lord has referred held that even in the case of a codifying Act we must look at the language used by the Legislature and not at the previous state of the law.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for E. I. E. Williams, Town Clerk, Ilkeston.*

Solicitor for respondents: *The Treasury Solicitor.*

(1) [1891] A. C. 107, 144. (2) [1910] 2 K. B. 831, 836.

J. R.

HANNAFORD *v.* MAY.

1935
May 15.

Coal mine—Regulation—Register of times during which men are in mine—Omission of particulars—Offence—Prosecution of manager by person other than inspector and without consent of Secretary of State—Competence of prosecution—Offence whether "committed personally" by manager—Coal Mines Regulation Act, 1908 (8 *Edw.* 7, *c.* 57), *s.* 2, *sub-s.* 1; *s.* 7, *sub-s.* 1—*Coal Mines Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 2, *sub-s.* 1; *s.* 3, *sub-s.* 1; *s.* 101, *sub-s.* 2; *s.* 102, *sub-s.* 5; *s.* 126 (*e*).

The Coal Mines Regulation Act, 1908, s. 2, sub-s. 1, provides: "The owner, agent, or manager of every mine shall . . . . cause a register to be kept in the form prescribed . . . . and containing the particulars prescribed . . . . with respect to the times at which men are lowered into and raised from the mine, and the cases in which any man is below ground for more than the time fixed . . . . and the cause thereof."

The Coal Mines Act, 1911, s. 102, sub-s. 5, provides: "No prosecution shall be instituted against the owner, agent, manager, or under-manager of a mine for any offence under this Act, not committed personally by such owner, agent, manager, or under-manager, which can be prosecuted before a court of summary jurisdiction, except by an inspector or with the consent in writing of the Secretary of State"; and that provision is made applicable to any offence against s. 2 of the Act of 1908.

The manager of a mine caused a register to be kept there purporting to be the register to be kept under s. 2, sub-s. 1, of the Act of 1908, and by the custom of the mine an official of the mine known as "the banksman" was appointed to keep the register and to make the necessary entries therein. In the register there were in respect of a certain date no entries giving particulars of the cause or causes of certain workmen being below ground on that date for more than the time fixed; and an offence was thus committed against that sub-section which could be prosecuted before a court of summary jurisdiction:—

Held, that that offence was an offence "committed personally" by the manager of the mine within the meaning of s. 102, sub-s. 5, of the Act of 1911; and consequently that that sub-section did not prevent a prosecution from being instituted against the manager for that offence by a miner's agent who was neither an inspector nor acting with the consent of the Secretary of State.

Lochgelly Iron and Coal Co. v. *M'Mullan* [1934] A. C. 1, 8, observations applied.

CASE stated by the stipendiary magistrate for Pontypridd.

On March 9, 1934, Mr. William H. Hannaford, hereinafter called "the appellant," was, and for four years previous to that date had been, manager of the Lewis Merthyr Colliery, including the Bertie and Trefor pits, Porth, Glamorganshire. On that date certain workmen employed at that colliery, namely, Humphrey Williams, W. J. Davies and Isaac Jones, were below the ground in the mine for more than the specified number of hours contrary to the Coal Mines Acts, 1887–1931. In a register which was kept at the mine, purporting to be the register which under the Coal Mines Regulation Act, 1908, s. 2, sub-s. 1, the owner, agent or manager of every mine is required to cause to be kept in the form prescribed by the Secretary of State containing the particulars prescribed by him with respect to the cases in which any man is below for more than the time fixed by the Act and the cause thereof, there were in respect of March 9, 1934, no entries made by the appellant or by any one in the register giving particulars of the cause or causes of these workmen being below ground on that date for more than the time fixed by the Coal Mines Acts, 1887–1931.

The entries in the register were usually and by custom of the mine made by an official of the mine known as "the banksman," whose duty it was to make the necessary entries in the register.

An information was preferred before the magistrate by Mr. William H. May, a miners' agent, hereinafter called "the respondent," against the appellant, for that the appellant on March 9, 1934, at Pontypridd, did not cause a register to be kept in the form prescribed by the Secretary of State containing the particulars required by the latter with respect to the cases in which men were below ground for more than the time fixed by the Coal Mines Acts, and the cause thereof, contrary to the Coal Mines Acts, 1887–1931.

The respondent in preferring the information against the appellant was not acting for or on behalf of an inspector of mines, and the prosecution against the appellant was instituted without the consent of the Secretary of State.

Upon the hearing of the information the above mentioned facts were admitted or proved.

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The appellant stated in his evidence that he was not aware that entries relating to these workmen being below ground beyond the specified number of hours on March 9, 1934, had not been made in the register.

It was contended on the part of the appellant that the failure to cause the register to be kept in accordance with the requirements of s. 2, sub-s. 1, of the Act of 1908, was not an offence committed personally by the appellant, the manager, and was of the class of offences which are required to be prosecuted, if at all, by an inspector of mines or by some person with the consent in writing of the Secretary of State in accordance with the provisions of the Coal Mines Act, 1911, s. 102, sub-s. 5, and s. 126, proviso (*e*), and that therefore the information having been laid otherwise than in that manner was improperly and wrongly laid, and the proceedings were outside the jurisdiction of the court.

It was contended on behalf of the respondent that inasmuch as a personal duty of supervision was imposed by s. 3, sub-s. 1, and s. 24, sub-s. 2, of the Act of 1911, the failure to cause the register to be properly kept was an offence committed personally by the appellant, the manager, and that therefore the information was rightly laid by the respondent as a private individual and was within the jurisdiction of the court.

The magistrate, being of opinion that there was an absolute duty under s. 2, sub-s. 1, of the Act of 1908, cast upon the owner, agent, or manager of the mine to cause a register to be kept in the form prescribed, and that, having regard to s. 3, sub-s. 1, of the Act of 1911, (1) there was a personal duty cast on the appellant, as manager in this case, to cause the register to be properly kept in accordance with these statutory provisions, decided that the offence charged was one which might be prosecuted by a person other than an inspector or a person having the consent in writing of the Secretary of State, and that accordingly the information against the appellant was rightly laid; and, as the register had admittedly not been properly kept in accordance with s. 2, sub-s. 1, of

(1) See p. 396 post.

the Act of 1908, he further decided that the appellant had personally committed the offence; and he therefore imposed upon the appellant a fine of 2*l.*

Evershed K.C. and *Godfrey Parsons* for the appellant: The conviction of the appellant was erroneous and should be quashed. The information charges that the appellant did not cause a register to be kept in the form prescribed containing the particulars prescribed with respect to the cases in which men were below ground for more than the time fixed and the cause thereof contrary to the Coal Mines Acts. The information obviously follows the terms of the Coal Mines Regulation Act, 1908, s. 2, sub-s. 1. If regard be had to that sub-section alone as unaffected by subsequent legislation, the appellant did not commit any offence against it. The sub-section provides, (inter alia): "The owner, agent, or manager of every mine . . . . shall cause a register to be kept in the form prescribed . . . . with respect to . . . . the cases in which any man is below for more than the time fixed . . . . and the cause thereof. . . . ." The only obligation of the manager under that provision is to provide a register in the prescribed form and to appoint a qualified banksman or other person at the top of the pit to enter in the register the prescribed particulars, and it cannot be disputed that the appellant duly performed that obligation. The further obligation to keep the register and enter in it the prescribed particulars is not that of the manager but of the banksman, and, consequently, the information in charging the appellant with the offence of failing to comply with that obligation is charging him with an offence of which he was not guilty. If the appellant did commit that offence, it was not an offence for which he could be prosecuted by the respondent, even under the Act of 1908. The sub-section in question goes on to provide that the register shall be open to inspection by the inspector. That implies that the inspector, as the only person who has a right to examine the register, is the only person entitled to prosecute for the offence of failing to enter in it the prescribed particulars; and it follows that the respondent here, who is not an inspector, has no right to prosecute. Subsequently, however, the Coal Mines Act, 1911, came into force, s. 126 of which provides that that Act shall apply to offences under such of the provisions of the earlier Acts as are unrepealed as if they were offences against that Act itself. Though s. 2, sub-s. 1, of the Act of 1908 is not repealed by the Act of 1911, it does not follow that s. 126 of the later Act makes the offence of failing to keep the register and enter the particulars therein an offence committed by the appellant under the later Act. Even though s. 126 of the Act of 1911 has the effect of making the offence of failing to keep the register an offence committed by the appellant under that Act, it is not an offence for which the appellant can be prosecuted by the respondent under that Act. Sect. 102, sub-s. 5, of that Act provides: "No prosecution shall be instituted against the owner, agent, manager, or under-manager of a mine for any offence under this Act, not committed personally by such owner, agent, manager, or under-manager, which can be prosecuted before a court of summary jurisdiction, except by an inspector or with the consent in writing of the Secretary of State; . . . ." The appellant was the manager of this mine, and, therefore, under that sub-section he could not be prosecuted for any offence under that Act or under any earlier Act to which that Act applies not committed personally by him, except by an inspector or with the consent of the Secretary of State. The offence of keeping the register improperly with which the appellant is charged was not an offence committed "personally" by him within the meaning of that sub-section. That term has there the meaning which ordinarily belongs to it when used in this sense—namely: "In one's personal capacity; as an individual person (as distinct from others); individually": see the Oxford Dictionary. The term signifies that the offence is committed by the manager himself and not through an agent. The manager can only commit personally the offence of failing to fill up or of improperly filling up the register when he is actually present at the place where the register is to be filled up, and not when he is at a distance from the register in his office or elsewhere.

If the manager is to be deemed to have committed personally every offence committed by an agent or representative he would be personally liable for almost all the offences under the Act. The offence of failing to fill up the register on the occasion in question was committed " personally " not by the appellant but by the banksman. The Acts always make it clear when the manager is to be liable for any contravention of or failure to comply with any of their provisions. Three different classes of cases may be distinguished: first, that of offences personally committed by some one other than the manager for which that person only is responsible; secondly, offences personally committed by the manager for which he only is responsible; and thirdly, offences personally committed by some one other than the manager, for which both that person and the manager are liable. An example of the first of these classes of cases arises under s. 14 of the Act of 1911, which requires the manager to appoint firemen, examiners and other deputies to perform particular duties, for a breach of any of which only the person charged with it would be liable. A further example, it is submitted, is furnished by the provision here in question, namely, s. 2, sub-s. 1, of the Act of 1908, under which only the person appointed to make the entries in the register is liable for failure to do so. An example of the second class of cases might occur under s. 3, sub-s. 1, of the Act of 1911, which provides that in every mine under the control of a manager " daily personal supervision shall be exercised by the manager." If in this instance the appellant committed any offence under that provision, that is not the offence with which he is here charged. Further examples of this class might arise under s. 18 of that Act, which requires the manager to send—not to cause to be sent—to the inspector a correct return for the preceding year of the particulars of employment in the mine; or under s. 20. Examples of the third class of cases may arise under ss. 94 and 95 of the Act of 1911, the former of which provides that the manager shall keep at the office a register and shall " cause " to be entered therein certain particulars as to all boys and girls employed at the mine; and the latter of which expressly enacts that if any person contravenes or fails to comply with any such provision he shall be guilty of an offence, and that in the event of any such contravention or non-compliance by any person whomsoever the owner, agent, and manager shall each be guilty of an offence unless he proves that he had taken all reasonable means to prevent the contravention. Further examples may arise under s. 88 of that Act, sub-s. 1 of which requires the manager to "cause" a copy of the abstract of the Act and of the regulations to be posted up at or near the mine, and sub-s. 2 of which provides that in the event of any non-compliance with the section by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence unless he proves that he has taken means to prevent the non-compliance. In no other sections of the Act is it provided that a manager, who is merely required to cause something to be done, shall himself be guilty of an offence in case that thing be not done. These last examples show that the Act draws a distinction between the agent who actually does the particular act and the manager who causes it to be done and that in the event of non-compliance an express provision is necessary to make the manager liable. Hence, as s. 2 of the Act of 1908 provides that the manager shall cause a register to be kept, but not that he shall be liable in the event of that register not being properly kept by the person appointed to keep it, it would seem to follow that in that event the manager is not guilty of any offence. But even if, in the event of that register not being properly kept by that person, the manager should be guilty of an offence, that offence would not be an offence "committed personally" by the manager within the meaning of s. 102, sub-s. 5, of the Act of 1911, and by virtue of that sub-section no prosecution could be instituted against the manager for that offence except by an inspector or with the consent of the Secretary of State. Therefore, as the appellant as manager is here prosecuted for an offence of that description by the respondent, who is neither an inspector nor a person acting with the consent of the Secretary of State,

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the prosecution was unauthorized, and the conviction of the appellant should be quashed.

Upjohn K.C. and *Trevor Morgan* for the respondent:

The appellant was rightly prosecuted and convicted, and the appeal should be dismissed. The information charges the appellant with an offence against the Coal Mines Regulation Act, 1908, s. 2, sub-s. 1, which provides that the manager of every mine shall cause a register to be kept in the form prescribed and containing the particulars prescribed with respect to the cases in which any man is below ground for more than the time fixed and the cause thereof. It cannot be disputed that on the day in question an offence was committed against that sub-section, since on that day not a single entry was made in the register of any of the cases in which a man had been below for more than the time fixed, or of the cause thereof. It is said that the person who actually keeps the register and makes the entries therein is the banksman, but the banksman is no statutory officer, being merely an ordinary workman to whom the manager finds it convenient to delegate the duty of keeping the register. Whether or not in this case the banksman was guilty of an offence for failing to make the entries in the register, the appellant, as manager, was undoubtedly guilty of the offence with which he is charged of failing to cause the entries to be made in the register. To the charge made against the appellant his only available defence is to show that the offence with which he is charged was not an offence "committed personally" by him as manager within the meaning of the Coal Mines Act, 1911, s. 102, sub-s. 5, and, therefore, that by that sub-section no prosecution could be instituted against him except by an inspector or by a person having the consent of the Secretary of State, to neither of which classes of persons did the respondent belong. The defendant cannot make good that defence, because it is clear that the offence charged was "personally committed" by himself. That offence consisted of a failure by the appellant to comply with s. 2, sub-s. 1, of the Act of 1908, which imposes upon the manager himself as distinct from any servant, agent or delegate an absolute unconditional and personal obligation to cause a register to be kept containing all the prescribed particulars. That that is the legal effect of such a provision appears from the observations of the Lords of Appeal in *Lochgelly Iron and Coal Co.* v. *M'Mullan.* (1) The classification given on behalf of the appellant of certain sections of the Act of 1911, according to the persons upon whom they impose liabilities, is not adequate, because certain of the sections introduce qualifications which interfere with that classification in various ways That Act provides by s. 2, sub-s. 1, that " Every mine shall be under one manager, who shall be responsible for the control, management, and direction of the mine " ; and by s. 3, sub-s. 1, that " In every mine required to be under the control of a manager, daily personal supervision shall be exercised by the manager " ; and these provisions would seem to impose upon the manager a personal responsibility for the contravention of almost any requirement of the Act. As to ss. 88 and 95, it is to be observed that, although each of these sections may provide that in the event of a contravention of its provisions the manager shall be guilty of an offence, each section goes on to provide that the manager may escape liability by proving that he had taken all reasonable means to prevent the contravention. In s. 2, sub-s. 1, of the Act of 1908 there is no such qualification of the very onerous personal obligation which that sub-section imposes upon the manager.

[LORD HEWART C.J. In order to support the case of the respondent, a prerogative instance should be shown of an offence not personally committed by the manager, for which nevertheless he would be personally liable.]

Such instances may arise under s. 101, sub-s. 2, of the Act of 1911, which provides that if a mine is not managed in conformity with the Act, the owner, agent, and manager shall each be deemed guilty of an offence against the Act ; and under s. 27, which provides (sub-s. 1) that certain things shall be done by officials none of whom shall be appointed to be manager, and (sub-s. 3) that any mine in which there is a non-compliance with the section shall be deemed to be not managed in conformity with the Act—a provision which

(1) [1934] A. C. 1, 8, 14, 18, 30, 31.

renders the manager liable under s. 101. Several other sections require various things to be done by persons other than the manager and then go on to provide that any mine in which there is non-compliance shall be deemed not managed in conformity with the Act. It is submitted that under each of those sections whenever any of the persons named fails to do something which he is required to do the result is that an offence is committed personally by the manager. Even if this offence was not committed personally by the manager the respondent might perhaps be regarded as qualified to prosecute for it, because, although he is not an inspector nor a person acting with consent of the Secretary of State, he is a man of position, being the agent of the South Wales Miners' Federation.

Evershed K.C. in reply: The case of *Lochgelly Iron and Coal Co.* v. *M'Mullan* (1) did not deal primarily with a question under the Coal Mines Acts, but with a question of liability under the Workmen's Compensation Act, 1925.

LORD HEWART C.J. This is a case stated by the stipendiary magistrate for Pontypridd. It arises out of a prosecution of the appellant, the manager of a coal mine, under the Coal Mines Regulation Act, 1908, and the Coal Mines Act, 1911, in which the magistrate gave judgment against the appellant and fined him *2l.* The question is whether the decision of the magistrate was correct in point of law. [His Lordship read the information as above set out and continued :]

It was not disputed that on the day named in the information certain men were below ground in the mine for a time exceeding the statutory period. It was not disputed that, although a register was kept at the mine purporting to be a register satisfying s. 2 of the Act of 1908, it contained no entry whatever of the fact that on that day these men were below ground for more than the time fixed or of the cause or causes of their so being below ground. As appears from the arguments in this Court, the real question and the only question to be decided by the magistrate was whether it

(1) [1934] A. C. 1.

was true to say that the failure or non-compliance exhibited by the facts of the case in contravention of the Act was such a failure as could be described as an offence committed personally by the manager.

The leading contention on behalf of the appellant as stated in the case was that the failure to cause the register to be kept in accordance with the requirements of s. 2, sub-s. 1, of the Act of 1908 was not an offence committed personally by the manager and was of the class of offences which are required to be prosecuted, if at all, by an inspector of mines, or by some person with the consent in writing of the Secretary of State. The importance of that contention is derived from the fact that in this case the prosecutor, the respondent, was a miners' agent who was not employed in the mine and was not a person authorized either by an inspector or by the Secretary of State to institute the prosecution. It was, therefore, an essential ingredient of the case for the prosecution that the offence was of such a kind as to come within the range of offences committed personally by the manager. That proposition is based upon s. 102, sub-s. 5, of the Act of 1911, which provides: "No prosecution shall be instituted against the owner, agent, manager, or under-manager of a mine for any offence under this Act, not committed personally by such owner, agent, manager, or under-manager, which can be prosecuted before a court of summary jurisdiction, except by an inspector or with the consent in writing of the Secretary of State. . . . ." The magistrate had to determine whether the offence here alleged was an offence committed personally by the manager. He concluded that it was, and the only question for this Court is whether in coming to that conclusion he made any error in law.

It is obvious, when one looks at the scheme of this legislation, which has sometimes been called the "miners' charter," that many steps have been taken in the course of it to accentuate the personal responsibility of the owner, agent, and manager of a coal mine. Their responsibility appears to be regarded by the Legislature as of supreme importance to the welfare of the persons employed in this difficult occupation. Time and again there are found in these sections provisions that in certain circumstances not one only but all three of these important persons may be held liable. By s. 2, sub-s. 1, of the Act of 1911, it is provided: "Every mine shall be under one manager, who shall be responsible for the control, management, and direction of the mine, and the owner or agent of every mine shall appoint himself or some other person to be the manager of such mine." By s. 3, sub-s. 1, of that Act it is stated: "In every mine required to be under the control of a manager, daily personal supervision shall be exercised by the manager, and, where an under-manager has been appointed by the owner or agent of the mine, also by"—not "by" but "also by"—"that under manager." In like manner one finds again and again such a provision, for example, as is contained in s. 3, sub-s. 3: "If in any mine there is a contravention of or non-compliance with the provisions of this section, the mine shall be deemed to be not managed in conformity with this Act," and where that inference is drawn the responsibility automatically falls on various individuals. Moreover by s. 126, proviso (*e*), of the Act of 1911 it is provided: "This Act shall apply to offences under such of the provisions of the Coal Mines Regulation Acts, 1887 to 1908, as are unrepealed by this Act in like manner as if they were offences against this Act, and expressions in those provisions shall have the same meaning as in this Act."

The particular provision which is here said to have been contravened is s. 2, sub-s. 1, of the Act of 1908. That subsection is to be construed in close connection with the Act of 1911, and the prosecutor in the court below being neither an inspector nor a person authorized by the Secretary of State, we have to decide whether in law it is incorrect to say that the offence alleged was committed personally by the manager.

The scheme of the Act of 1911 seems obviously to contemplate three different things. At one end of the scale there are offences committed by the manager personally; at the other end of the scale are offences committed by some person other than the manager. There is also an intermediate class of offences in which the offence is not personally committed by the manager but yet is of such a kind that by an inspector or with the consent of the Secretary of State the prosecution may be against the manager. It was argued for the appellant that if it should be the case that the offence here charged was committed personally by the manager, it must follow that every offence committed in a coal mine, at any rate against this legislation, must be an offence committed personally by the manager. In order to rebut that argument it was necessary to find some prerogative instance or instances of cases where, although at first blush one would say that the offence was not committed personally by the manager, nevertheless under this Act the manager might have a properly instituted prosecution launched against him in respect of them. It would seem that Mr. Upjohn has filled that lacuna. He has satisfied me that under various provisions of the Act of 1911, and not least under ss. 101 and 27, there are offences which, if the case were a tabula rasa, one would say were not committed personally by the manager, but yet are offences to proceedings in respect of which the manager might properly be made a defendant. More than that, over the whole of this legislation there is scattered here and there the provision that in certain circumstances where certain things have been done or omitted a mine is to be deemed to be a mine not managed in conformity with the provisions of this Act. That being so, it follows that in that case the manager, although he had no actual connection with the commission of an offence, might yet find himself convicted of it. In these circumstances it seems to me that the decision of the magistrate was right.

I would add only one further observation. Reference was made to *Lochgelly Iron and Coal Co.* v. *M'Mullan* (1), a recent Scottish case in the House of Lords. It is true, as was pointed out by Mr. Evershed, that, while we are dealing here with the Coal Mines Act, 1911, that case arose under both that Act and the Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84); but it is also true that it was there alleged that there had been a breach by the employers of the statutory duty imposed upon

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them by ss. 49 and 52 of the Coal Mines Act, 1911. It was with reference to that allegation that Lord Atkin said : " It is further beyond question that these provisions impose a special duty upon the employer towards those for whose safety they are designed," and then, having referred to certain cases, he went on to say : " And in an action founded on a breach of such a duty . . . . it is irrelevant whether his "—the employer's —" servants had disregarded his instructions or whether he knew or not of the breach." (1) That passage is cited not as concluding this matter but as throwing light upon it and as exhibiting the principle which is to be collected from this legislation. I think that that case pro tanto supports the view taken by the stipendiary magistrate in this case.

Having regard to the whole matter, and paying the greatest attention to the able argument of Mr. Evershed, I entertain no doubt that the magistrate was right and that this appeal should be dismissed.

AVORY J. I am of the same opinion. There is no question here that an offence has been committed against s. 2, sub-s. 1, of the Coal Mines Regulation Act, 1908. The whole question is whether that offence was, within the meaning of s. 102, sub-s. 5, of the Coal Mines Act, 1911, " committed personally " by the manager of the mine. It is to be observed that in s. 2 of the Act of 1908, which creates this offence, there is no proviso, such as is to be found in many sections of the Act of 1911, exempting the owner, agent, or manager of the mine in certain circumstances from liability in the event of any contravention of the section. Take, for example, an analogous section of the Act of 1911, namely s. 94, which requires the owner, agent, or manager to keep in the office a register and to cause to be entered in that register the name, age, residence, and date of first employment of all boys employed in the mine below ground. That section is followed by s. 95, which makes it an offence for any person to contravene or fail to comply with any provision of the Act with respect to the employment of boys and others, and goes on to provide : " in the event of any such contravention or non-compliance by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, ... to prevent the contravention or non-compliance." Although ss. 94 and 95 impose a somewhat similar duty upon the manager, and give him an excuse in certain circumstances, there is no provision for any such excuse in s. 2 of the Act of 1908.

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(1) [1934] A. C. 8, 9.

It will no doubt be said that by virtue of s. 126, proviso (*e*), of the Act of 1911, which provides that that Act shall apply to offences under such of the provisions of the earlier Acts as are unrepealed by that Act in like manner as if they were offences against that Act, an offence under s. 2, sub-s. 1, of the Act of 1908 is now to be treated as if it were an offence under the Act of 1911. I have therefore looked to see whether there is any provision in the Act of 1911 which affords any excuse to the manager for an offence against the Act of 1908, such as is to be found in s. 95 of the Act of 1911. The only provision which seems to be at all relevant is in s. 102 of the Act of 1911. That section contains a short code for the protection of officials. The marginal note to the section is: "Prosecutions of owners, agents, managers, etc.," and I think it might be more appropriately worded: "Protection of owners, etc., in cases of prosecution." Sub-s. 1 of that section provides: "Where proceedings are taken under this Act against the owner or agent"—not the manager—"of a mine in respect of an offence under this Act for which the owner, agent, or manager or each of them is liable under this Act, the owner or agent shall not be liable to any penalty if he proves to the satisfaction of the Court. . . . . (*c*) that the offence was committed without his knowledge, consent, or connivance." Then sub-s. 3 contains this provision: "Nothing in this Act shall render the owner, agent, or manager of a mine liable to a penalty in respect of any contravention of or non-compliance with the provisions of this Act, if he proves that the contravention or non-compliance was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision." That seems to me to be the only protection which is afforded to a manager who is accused of an offence under s. 2 of the Act of 1908, and it is to be observed that the protection afforded to him is there limited to his proving that the contravention or non-compliance was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision. It appears to me to be impossible that the manager in this case can bring himself within that clause. It is impossible for him to show that the offence was due to a cause over which he had no control and against the happening of which it was impracticable for him to make provision, because, in the first place, s. 3 of the Act of 1911 requires that he shall exercise daily personal supervision, and further, if he takes the risk of delegating his duty to the banksman, it clearly remains his duty to supervise the work of the banksman. In my view, the effect of s. 2 of the Act of 1908 is to impose upon the manager a personal obligation to see that the required particulars are entered in the register.

As there was, to my mind, a personal obligation of that nature on the manager, and a breach of that obligation, I cannot doubt that the offence was one committed personally by the manager, and I therefore agree that this appeal should fail.

HUMPHREYS J. I agree. The point for decision is a very small one. It seems to me that the case for the appellant is based upon very inconspicuous merits. There can be no doubt that the manager of this mine committed an offence. There can be no doubt that that offence was one for which he was liable to be prosecuted summarily. He was so prosecuted and was convicted.

The only point taken on his behalf is that the person who set the law in motion against him was not authorized to do so. Why? The appellant was prosecuted under the Coal Mines Regulation Act, 1908, and the provisions of that Act should be looked at to ascertain what was the offence of which he was said to be guilty and whether the person who took the proceedings was entitled to do so. Sect. 2, sub-s. 1, provides that the manager shall cause a register to be kept in the form prescribed by the Secretary of State, and containing the specified particulars. The appellant did not cause that register to be kept containing the proper particulars, and, accordingly, it is said that he came within s. 7, which provides: "If any person contravenes or fails to comply with any provision of this Act or connives at any such contravention or failure on the part of any other person, he shall be guilty of an offence against this Act," and then goes on to impose penalties. So far, then, if he had been prosecuted for this offence at any time up to 1911 he could have been properly convicted of it. Then came the Act of 1911, which created a large number of new offences, and provided in regard to them that while certain persons, including the manager, should be prima facie guilty if there had been any failure to comply with any provision of the Act, yet it should be a defence for him if he can show—and it is to be observed that the onus is on him to do so—that he took reasonable precautions to prevent any infraction of the provisions of the Act. Perhaps the Legislature, when it brought the provisions of the Act of 1908, including s. 2, and s. 7, which creates penalties, within the terms of the Act of 1911, omitted to put the person who was prosecuted under the Act of 1908 in the same position as a person who was prosecuted for some offence under the Act of 1911. It may have done so designedly or undesignedly, but that is the position.

It is not, therefore, contended here that the appellant did not commit the offence with which he was charged, but that he did not commit it personally. It is to be observed that the words of s. 102, sub-s. 5, of the Act of 1911 are "any offence under this Act not committed personally by such . . . . manager." The offence was committed. Who committed it? As I understand the facts the offence was committed by the manager, and by him personally. This was not a matter for which he became responsible because some one else had omitted to do what he was required to do. It is not a case like the case under s. 27, where no person is referred to and the name of the manager is not mentioned,

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but things are directed to be done, and then, by a general provision, s. 101, sub-s. 2, as the mine is not managed in conformity with the Act, the manager is made responsible and liable to prosecution. That was not the case here. This is a case in which the appellant was prosecuted because he failed to do something which by the Act of 1908 he was personally required to do, and it seems to be much the same as a prosecution for the personal commission of an unlawful act. If he had in person made a wrong entry in the register, it could not be argued that he was not personally responsible for having done so, and, if to do so was an offence, that it was not an offence which he had committed personally. The Act, however, has put upon him, and put upon him personally, the duty of causing the register to be kept. It seems to me that the admirable argument of Mr. Evershed has failed to dispose of one very obvious difficulty. The Act requires the manager to do certain things and he has in fact failed to do one of these things. He has been prosecuted and convicted for having failed to do that thing, and, in my view, it is not possible to say that he has not committed personally the offence of which he was convicted.

On that ground alone, as well as for the reasons given in the judgments already delivered, I agree that the conviction was right and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Savage Cooper & Wright, for W. H. F. Barklam, Cardiff.*

Solicitors for respondent: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

J. R.

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June 5, 7.

SIVEYER *v.* ALLISON.

[1934. S. No. 3967.]

Marriage—Agreement to marry—Promise by married man to unmarried woman to marry on his obtaining a decree of nullity—Validity—Public policy.

An agreement between a married man and an unmarried woman, who knows that he is married, that they will marry if and when he obtains a decree of nullity of his marriage, is illegal and void as being contrary to public policy: *Semble.*

Wilson v. *Carnley* [1908] 1 K. B. 729, applied.

Newbould v. *Attorney-General* [1931] P. 75, held inapplicable.

Where an unmarried woman, in reliance on representations by a married man that he can obtain a decree of nullity of his marriage and will marry her thereafter, enters into an immoral association with him and thereby suffers damage, she cannot, on the representations proving to have been false, maintain against him an action for deceit, being herself a party to the immoral association: *Semble.*

FURTHER CONSIDERATION by Greaves-Lord J. of an action tried by him and a jury.

The following statement of the facts of the case, whether admitted or found by the jury, is taken from the judgment of the learned judge: The plaintiff, Ethel Eva Siveyer, a single woman, aged thirty-four, was formerly engaged as a cashier in a restaurant where in the year 1926 she met the defendant, William Allison, who was by profession an architect and a man of some culture and social position. He appears to have paid marked attention to her in difficult conditions, as the proprietors of the restaurant were strict and did everything to discourage such acquaintanceships. However, the acquaintance ripened into friendship as the parties discovered they had mutual interests in music and art, and in 1927 there appears to be no doubt they were on terms of affection. The plaintiff says the defendant told her he had been jilted in love in early life and since then had not interested himself in women, and the jury found that by so doing the defendant had represented that he was a bachelor. In October, 1927, it was alleged the plaintiff and defendant became engaged, and the jury found that in November, 1927, in reliance on the alleged promise, and also upon the statement that he was a bachelor, the plaintiff permitted intimacy which continued for some years. It is only right to say that the defendant said that he regarded the plaintiff as an honourable woman and in no sense loose except for her lapse under his influence, and there is no ground for any suggestion that there has been any misconduct on her part with any one else. In December, 1927, the defendant informed the plaintiff that he was in fact a married man, but that the conditions of his marriage were such that owing to the physical condition of his wife, whom he alleged to be impotent, the marriage had never been consummated and he believed it to be no marriage. Shortly after he said he was advised he had grounds for a decree of nullity and intended to obtain one and, it was alleged, the parties agreed that if the plaintiff continued the conditions of intimacy he would on obtaining such decree marry the plaintiff. He made some suggestion of matrimonial proceedings, but on his wife intimating that any proceedings which dishonoured her would be opposed he appears to have abandoned the idea of such proceedings.

The plaintiff had brought the action in September, 1934, against the defendant, claiming: damages for breach of an agreement to marry made between the parties in October, 1927; damages for deceit by the defendant in representing to the plaintiff in the summer of 1926 that he was a bachelor, in consequence whereof the said agreement and relevant facts took place; damages for breach of an agreement to marry made between the parties in the end of December, 1927, after the defendant had informed the plaintiff that he was already married and that he could and would obtain a decree of nullity or divorce; the return of a diamond ring belonging to her; 25*l.* money lent by the plaintiff to the defendant; and damages for deceit by the defendant in representing to the plaintiff that he could and would obtain a decree of nullity whereby she had suffered damage in that she had thereafter continued to associate with the defendant.

The defendant in his defence had alleged (inter alia) that he would rely upon the Limitation Act, 1623 (21 Jac. 1, c. 16); and that the enforcement of any of the agreements, promises or representations alleged or complained of would be contrary to public policy.

On May 29 and 30, 1935, the action was tried before Greaves-Lord J. and a common jury.

The jury, having heard the evidence on both sides, found the facts as above stated and awarded damages to the plaintiff on each of her claims for damages; and they also found that the defendant detained the said ring from the plaintiff and that its value was 15*l*., and that the plaintiff had lent money to the defendant amounting to 25*l*.

On June 5, 1935, the case came before his Lordship for the argument of questions of law.

J. Serrell Watts for the plaintiff.

F. W. Beney and *Neil Lawson* for the defendant.

The questions of law raised, and the arguments advanced and authorities cited by counsel on both sides, sufficiently appear from the judgment of the learned judge.

Cur. adv. vult.

June 7. GREAVES-LORD J. read a judgment which, after stating the facts as above set out, proceeded as follows: In these circumstances the plaintiff claims damages for breach of promise of marriage said to have been made first, in October, 1927, before she knew that the defendant was married; and said to have been made, secondly, on representation as to the power to obtain a decree of nullity in December, 1927, or soon after. As to the first of these alleged promises of marriage it is argued on the strength of *Wild* v. *Harris* (1) that such an action will lie, and that the subsequent representation at the end of 1927 as to the marriage and the right to the decree of nullity differentiates this case from *Wilson* v. *Carnley* (2), where it was held that a promise made by a married man to one who knew of the marriage was not enforceable. It should be pointed out that even if *Wild* v. *Harris* (1) applies, the time within which the plaintiff could sue in respect of breach of contract would run under the Statute of Limitations from December, 1927, when the plaintiff discovered that the defendant was married, and therefore that any claim in respect of such promise—that is the first promise—was barred in December, 1933, and yet the action was not commenced until 1934. Further, there was in my opinion no corroborative evidence which expressly supported either promise of marriage, and the claims would in my opinion fail for this reason also. In my view, however, the case of *Wild* v. *Harris* (1) does not apply, and I prefer the opinion of Vaughan Williams L.J., expressed in *Wilson* v. *Carnley* (2), that a married man is incapable of legally contracting to marry, and the fact that an innocent person is persuaded into purporting to make such a contract does not give rise to any claim in contract, as where there is no contract there can be no breach. On that point I think that decision is entirely in accordance with the decision of Scrutton L.J. in *In re Mahmoud and Ispahani* (3), because although the contracts were quite different, the principles of law applying to the two cases are exactly the same.

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(1) (1849) 7 C. B. 999.

(2) [1908] 1 K. B. 729.

It is said, however, that a claim could arise in tort for deceit. However this may be, and I think there is a good deal to be said for the proposition, the decision of this question could not result in judgment for the plaintiff, as any right would be barred by statute. It is said that the statute cannot run because the defendant fraudulently concealed the true position by misrepresentation as to the right to a decree of nullity. In my view this is not the case, as although the defendant may have expressed an opinion as to his rights, which I think was unfounded, the fact of the existing marriage was known from December, 1927, and any misrepresentation was rather one of law than of fact. On the evidence of the defendant I find that it was not true that his marriage had not been consummated. The parties had admittedly lived

(1) 7 C. B. 999.
(2) [1908] 1 K. B. 729, 733 seq., 736.
(3) [1921] 2 K. B. 716, 729.

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together as man and wife for eighteen months, and I think when he answered questions on that head the defendant knew the full implications of such an answer. But, even if it were not statute-barred, such an action of deceit would not lie. The damages claimed are based on an allegation that the plaintiff was induced to continue her association with the defendant, which was an immoral association, and I am clearly of opinion that such damage is not recoverable. It was sought to amend the claim by adding an allegation that the damage caused to the plaintiff was by inducing her to remain single. I refused to allow such an amendment. The application was after verdict, and in my opinion it would be unfair to amend the claim at that stage.

Apart from this, it was further contended that the second conditional promise to marry was valid because of the misrepresentation as to a decree of nullity. It was said that that altered the position and prevented any illegality, and reference was made to 3 Coke's Institutes, in the edition published in 1809, p. 88, ch. 27. I find, however, that that passage, so far from being authority that proceedings of this kind would be maintainable on the ground that the marriage was a void marriage, really and expressly contradicts any such suggestion, because it states that "If any person . . . . being married, doe at any time after marry any person . . . . then every such offence shall be felony," and in a note to the expression "being married" the learned author says: "This extendeth to a marriage de facto, or voydable by reason of a precontract, or of consanguinity, or of affinity, or the like: for it is a marriage in judgment of law untill it be avoided, and therefore though neither marriage be de jure, yet they are within this statute," and that I find is cited in Archbold's Criminal Pleading, 29th ed., p. 1321, where certain Irish cases are also referred to. The case of *Newbould* v. *Attorney-General* (1) was also cited in support of this proposition; but, while I, of course, treat that decision with the profoundest respect, I do not think it is germane to this point. It is dealing with the totally different question of the possibility of legitimating a child,

(1) [1931] P. 75.

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and has no definite reference to the question of public policy involved in our law with regard to contracts of marriage. I therefore do not accede to this argument, as in my view the doctrine of public policy applies wherever there is a subsisting marriage, and this is not altered by the fact that the decree of nullity when obtained would declare the marriage null and void ab initio.

For these reasons the claims for breach of promise and deceit fail, and on these main claims my judgment is for the defendant. On the answers of the jury the claim for the return of the ring, or of 15*l.*, its value, succeeds, as also does the claim for 25*l.* money lent or expended for the use of the defendant. I think that on the claims on which he succeeds my judgment for the defendant must be with costs. I see no grounds for depriving him of the costs; on the contrary, the other claims on which the plaintiff succeeds were brought in this Court, and properly brought in this Court, because they were associated with the main claims. I shall give costs to the plaintiff in respect of both the claims on which she succeeds and certify for them on the High Court scale. (1)

Judgment accordingly.

Solicitors for plaintiff: *T. J. Robinson & Son.*
Solicitors for defendant: *Kenneth Brown, Baker, Baker.*

(1) See *Fender* v. *Mildmay*, p. 334 ante.

J. R.

CROXFORD AND OTHERS v. UNIVERSAL INSURANCE COMPANY, LIMITED.

1935
July 1, 5.

[1935. C. No. 1077.]

Insurance (*motor*)—*Third-party risks*—*Judgment recovered by third party against insured*—*Action under statutory provision by third party against insurer for amount of judgment*—*Certificate of insurance properly cancelled before coming into force of statutory provision*—*Proceedings against insured commenced before that event, but judgment obtained subsequently thereto*—*Declaration not obtained of right to avoid policy*—*Effect*—*Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 36, *sub-s.* 5—*Road Traffic Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 10, *sub-ss.* 1, 3; *s.* 42.

An insurance company issued to the owner of a motor vehicle a policy of insurance against third-party risks and delivered to him a certificate of insurance. A cause of action covered by the policy arose in favour of third parties against the insured. Subsequently, the company, having a right to do so, elected to avoid the policy on certain grounds, and the policy was avoided and the certificate of insurance was properly cancelled. Thereafter, but before s. 10 of the Road Traffic Act, 1934, had come into force, the third parties brought their action against the insured, and, after that section had come into force, they recovered judgment in that action. In an action brought under that section by the third parties against the insurance company to recover the amount of the judgment:—

Held, that the plaintiffs were entitled to recover; inasmuch as a certificate of insurance had in fact been delivered to the insured within the meaning of the section, the judgment sued upon had been obtained after the coming into force of the section, and the defendants had not obtained a declaration under sub-s. 3 of the section that they were entitled to avoid the policy; and notwithstanding that the earlier action had been brought and the policy and certificate of insurance cancelled before the coming into force of the section.

Ward v. *British Oak Insurance Co.* [1932] 1 K. B. 392, held inapplicable.

ACTION tried by Horridge J. without a jury.

By a policy of motor insurance executed on December 20, 1933, in accordance with the Road Traffic Act, 1930, the Universal Insurance Company Ld. (hereinafter called "the defendants"), undertook to indemnify one Herbert Davison (hereinafter called "the insured"), against liabilities incurred by him to third parties in respect of a motor lorry, and by the terms of the policy the defendants had a right to avoid it on certain grounds.

The defendants also delivered to the insured a certificate of insurance in the prescribed form pursuant to the Act of 1930, s. 36, sub-s. 5.

On June 13, 1934, Mr. John William Croxford was killed by reason, as alleged, of the negligence of the insured in the driving and management of the motor lorry.

By a letter dated June 29, 1934, from the defendants to the insured the defendants elected to avoid the policy on the ground of alleged misstatement or concealment of material facts by the insured, and requested the return of the certificate of insurance.

On July 12, 1934, the certificate of insurance was returned by the insured to the defendants and properly cancelled.

On July 31, 1934, the Road Traffic Act, 1934 (1), received the Royal Assent.

On August 3, 1934, the widow, mother, and children of

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(1) The Road Traffic Act, 1934, provides :—

Sect. 10 : " (1.) If, after a certificate of insurance has been delivered under sub-s. 5 of s. thirty-six, of the principal Act [Road Traffic Act, 1930] to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (*b*) of sub-s. 1 of s. thirty-six of the principal Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

" (3.) No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it."

Sect. 42 : " (3.) This Act shall come into operation on such day

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the deceased Mr. J. W. Croxford (hereinafter called "the plaintiffs") brought an action under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), against the insured, alleging that the death of the deceased had been caused by the negligence of the insured and claiming damages.

On January 1, 1935, Part II. of the Act of 1934, which comprised s. 10 thereof, came into force. (1)

On February 6, 1935, the plaintiffs obtained judgment for 3000*l*. and costs in the action which they had brought against the insured.

On April 2, 1935, the plaintiffs, purporting to proceed under the Act of 1934, s. 10 (1), brought the present action against the defendants, claiming a declaration that the defendants were liable to pay to the plaintiffs the amount of that judgment with interest and costs and payment of the same.

The defendants in their amended defence stated (inter alia): (para. 1) that they denied that the insured was the holder of the certificate of insurance at any material time; (para. 2) that the policy was issued to the insured on the faith of a written proposal signed by the insured; and that the information in that proposal was incorrect in material particulars, and that by the terms thereof and of the policy the defendants became entitled to avoid the policy; (para. 3) in the alternative the policy was voidable by reason of the concealment of material facts; (para. 4) that the defendants elected to avoid the policy, and that the certificate of insurance was returned by the insured; (para. 6) that the policy had been avoided and the certificate returned before the Act of 1934 was passed and before Part II. thereof came into force; (para. 7) that the plaintiffs' cause of action arose before that Act was

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or days as the Minister may appoint, and the Minister may fix different days for different purposes and different provisions of this Act."

By the Road Traffic Act, 1934 (Date of Commencement) Order (No. 3), 1934, the Minister of Transport appointed and ordered that the provisions of the Act of 1934, Part II., in which s. 10 thereof is included, should come into operation for all purposes on January 1, 1935.

(1) See note (1), ante, p. 410.

passed or before Part II. thereof came into force; and (para. 9) that by reason of the premises the plaintiffs never became entitled to maintain any claim against the defendants under s. 10 of that Act, nor did the defendants ever become liable to the plaintiffs thereunder.

R. Fortune and *W. G. Wingate* for the plaintiffs. The plaintiffs, having recovered judgment against the insured in the action brought by them against him, are entitled under s. 10 of the Road Traffic Act, 1934 (1), to recover the amount of that judgment from the defendants. All the circumstances necessary to bring the case within that section are here present. A certificate of insurance was delivered to the person by whom the policy was effected—namely, the insured. Judgment in respect of such a liability as is required to be covered by a policy, and was a liability covered by this policy, has been obtained against the insured by the plaintiffs. It therefore follows, in accordance with the terms of the section, that, notwithstanding that the defendants have avoided or cancelled the policy, they are bound to pay to the persons entitled to the benefit of the judgment namely, to the plaintiffs, the sum payable thereunder. The plaintiffs' cause of action depends upon the judgment recovered by them against the insured, and, that being so, it is not necessary to their success in the action that s. 10 (1) should have a retrospective operation. The section came into force on January 1, 1935, and the judgment sued upon was not obtained until a later date—namely, February 6, 1935. If the plaintiffs' cause of action depends upon the policy and the certificate which were cancelled before the section came into force, then, no doubt, the plaintiffs cannot succeed unless the section is retrospective; but it does not follow that they cannot succeed. It is true that a statute has not a retrospective operation unless it is the intention of the Legislature that it should have such an operation, but on the other hand, a statute does operate retrospectively where it is clear from its provisions that it is intended to do so: per

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(1) See note (1), ante, p. 410.

Jessel M.R. in *Quilter* v. *Mapleson.* (1) This section contemplates any case of a third party recovering from the insurer on a judgment after the policy has been cancelled, and it must therefore be intended to operate retrospectively in a case such as this in which the policy has been cancelled before the section came into force.

Roland Oliver K.C. and *Tristram Beresford* for the defendants: The plaintiffs have no cause of action against the defendants. On its true construction s. 10 of the Road Traffic Act, 1934 (2), must be read as meaning that if judgment in respect of a liability covered by the policy of insurance is obtained by a third party against the insured, then notwithstanding that the insurer may be entitled to avoid or cancel the policy or may have avoided or cancelled it "since the section came into force," the insurer shall pay to the third party the amount of the judgment. According to that construction of the section it gives the plaintiffs no right of action against the defendants. By the middle of July, 1934, the policy and the certificate of insurance had been properly avoided and cancelled and the contract of insurance by which the defendants had been bound was at an end, but s. 10 did not come into force until January 1, 1935, when the contract of insurance was already dead; and the coming into force of the section could not bring that contract to life again. The section cannot be made to apply to this case except by attributing to it a retrospective operation. To ascribe to a statute a retrospective operation is to say that it provides that at a past date the law shall be taken to have been that which it was not: per Buckley L.J. in *West* v. *Gwynne.* (3) It cannot be presumed that a statute is retrospective, and the burden is upon those who assert that it is. In the present case the plaintiffs cannot discharge that burden by showing that s. 10 is retrospective. The Court will not construe a statute as retrospective unless it is compelled to do so by its express terms or by necessary implication therefrom. Neither by the express terms of s. 10 nor by implication therefrom is the Court bound to treat the section as retrospective. On the contrary it is plain from the language of the section that it is not retrospective. It is provided by sub-s. 3 of s. 10 (1) that no sum shall be payable by the insurer, if in an action commenced before or within three months after the commencement of the proceedings in which the judgment was given he has obtained a declaration that he is entitled to avoid the policy. Until the Act had been passed and the section had come into force the insurer could not avail himself of this provision, and the fact that that provision is contained in the section is, therefore, a clear indication that the section is not intended to operate retrospectively. In the present case the proceedings in which the judgment was given were commenced in August, 1934, and the defendants in order to obtain the protective declaration mentioned in sub-s. 3 (1) must have obtained it at the latest three months after that date—namely, in November, 1934, at which time the section had not as yet come into force. Further, s. 42, sub-s. 3, which provides that the Act is to come into operation on such day or days as the Minister may appoint, is inconsistent with the Act being retrospective, for if the Act had been retrospective there would have been no need for that provision. Moreover, a statute ought not in general to be construed as retrospective where the effect of so construing it would be to disturb existing rights. Sect. 10 (1) ought not, therefore, to be so construed, because the effect of so construing it will be to deprive the defendants of the immunity to which they became entitled on the avoidance and cancellation of the policy and certificate of insurance. The view that s. 10 is not retrospective is supported by the case of *Ward* v. *British Oak Insurance Co.* (2)

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(1) (1882) 9 Q. B. D. 672, 674.

(2) See note (1), ante, p. 410.

(3) [1911] 2 Ch. 1, 12.

R. Fortune in reply. Sub-s. 1 of s. 10, which is the main enactment of the section, provides in imperative terms that if judgment is obtained against any person insured by the policy the insurer shall pay to the persons entitled to the benefit of the judgment any sum payable thereunder ; and

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(1) See note (1), ante, p. 410.

(2) [1932] 1 K. B. 392.

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it cannot be intended that sub-s. 3, which is a subsidiary provision, should override sub-s. 1.

Cur. adv. vult.

July 5. HORRIDGE J. read the following judgment: On February 6, 1935, the present plaintiffs obtained a judgment for 3000*l.* and costs in respect of the death of one John William Croxford by reason of the negligence of Herbert Davison in the driving and management of a certain motor lorry on June 13, 1934. The liability of Herbert Davison was a liability required to be covered by a certificate of insurance under s. 36, sub-s. 5, of the Road Traffic Act, 1930. The present defendants had covered such liability by a certificate of insurance, but that certificate of insurance had been properly cancelled on July 12, 1934.

The plaintiffs now claim that under s. 10 of the Road Traffic Act, 1934, they are entitled to recover from the defendants the amount of the judgment and costs notwithstanding the cancellation of the certificate.

The question I have to decide is whether or not, inasmuch as the judgment was obtained subsequently to the coming into operation of the Road Traffic Act, 1934, on January 1, 1935, under s. 42 of that Act the plaintiffs are entitled to recover, the certificate having been cancelled before the coming into operation of s. 10 of that Act. This is clearly a case where a certificate of insurance had been delivered within the wording of s. 10. That section provides: [his Lordship read sub-s. 1 of the section and continued:] It is to be observed that the section says that notwithstanding the insurer may have avoided or cancelled the policy such insurer shall pay the person entitled to the benefit of the judgment.

It was contended before me on behalf of the defendants that the effect of my deciding in favour of the plaintiffs would be to give a retrospective effect to the Act, and that such retrospective effect should not be implied unless the words of the Act clearly show that it was intended to be implied.

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It was further pressed upon me that sub-s. 3 of s. 10 shows that section could not be intended to apply to a cancellation of an insurance certificate before the Act came into operation, as it was suggested that proceedings could not be taken for the declaration mentioned in that Act before the Act came into operation.

In this case, however, the Act of Parliament was known, as it had received the Royal Assent on July 31, 1934, and I cannot see why the defendants could not have taken proceedings under sub-s. 3 to obtain protection under that section.

Even if such proceedings could not have been taken, I do not think this fact would prevent the plaintiffs from recovering, the real question, in my view, being whether or not the judgment was obtained subsequent to the coming into operation of s. 10. It was so obtained in this case and is a liability in respect of which the certificate of insurance had been granted.

My attention was drawn to the case of *Ward* v. *British Oak Insurance Co.* (1), but that was a decision under different sections of The Third Parties (Rights against Insurers) Act, 1930, (21 and 22 Geo. 5, c. 25) and I do not think it assists me in coming to a conclusion.

There must be judgment for the plaintiffs for 3000*l.*, the amount of the judgment in the previous action, with interest thereon at 4 per cent. from the date of that judgment, and costs.

Judgment accordingly for plaintiffs.

Solicitors for plaintiffs: *E. C. Kilsby & Son, for E. Edwards & Son, East Ham.*

Solicitors for defendants: *A. D. Vandamm & Co.*

(1) [1932] 1 K. B. 392.

J. R.

WICKHAMBROOK PAROCHIAL CHURCH COUNCIL *v.* CROXFORD.

C. A.
1935
March 20, 21, 22; *May* 3.

Ecclesiastical Law—Repair of Chancel—Liability of Owner of part of tithe rentcharge—Cost of repairs exceeding amount of tithe rent received—Liability, whether limited to amount of tithe received—Right to contribution from other tithe rent owners—Chancel Repairs Act, 1932 (22 *Geo.* 5, *c.* 20), *ss.* 1, 2, 3, 4.

The liability of a lay impropriator of a tithe rentcharge to pay the costs of the repair of the chancel of a parish church is personal and several and not joint and is not limited to the amount of the tithe rent received by him.

In an action by the plaintiff council against the defendant under the Chancel Repairs Act, 1932, calling upon her to pay 123*l.* 12*s.* 6*d.*, the reasonable estimated cost of repairing the chancel of the parish church, on the ground that she was the owner of an impropriate rentcharge of the value of 39*l.* 11*s.* 9*d.*, the defendant contended that but for s. 2, sub-s. 3, of the Chancel Repairs Act, 1932, she could only have been held liable if she was a person who would have been liable to be admonished by the appropriate Ecclesiastical Courts, and that she could not in fact have been so admonished, since the amount she had received from the tithe rentcharge was less than the cost of the repairs. The county court judge accepted this view and dismissed the action. On appeal:—

Held (reversing the decision of the county court judge), that the liability of the defendant being personal and several and not joint, she would have been liable to be admonished by the appropriate Ecclesiastical Courts to repair the chancel, and was therefore liable to do so notwithstanding that the sum received by her in respect of the rentcharge was less than the estimated cost of the repairs.

But, *held*, that the defendant on payment of the cost of the repairs would be entitled to obtain contribution from the other tithe owners.

APPEAL from the Bury St. Edmunds County Court.

This was a proceeding under the Chancel Repairs Act, 1932, instituted by the Parochial Church Council of the Parish of Wickhambrook in the county of Suffolk against Yvonne Croxford (spinster) and Constance Edith Marie Croxford, wife of Frank Leonard Croxford and mother of Yvonne Croxford, claiming against the defendants as lay impropriators and as such liable for the repair either wholly or in part of the chancel of the parish church of Wickhambrook the sum of 123*l.* 12*s.* 6*d.*, the estimated cost of putting the chancel in repair. Notice to repair as required by s. 2, sub-s. 1, of the Chancel Repairs Act, 1932, was duly served on the defendants, and it was admitted at the hearing before the county court judge that the sum of 123*l.* 12*s.* 6*d.* represented the reasonable cost of the necessary repairs.

The history of the matter, so far as material, was stated by the county court judge (Judge Hildesley) in his considered judgment as follows. By a tithe commutation agreement made in 1840 there was effected a merger of a large portion of the tithes issuing out of lands in the parish of Wickhambrook. The remaining portion was commuted for a tithe rentcharge amounting in the aggregate to 120*l.* per annum. This was apportioned between the vicar and the impropriate rector, whose apportioned share amounted to 52*l.* 10*s.* The impropriate tithe rentcharge was now owned by several persons, of whom the defendant and/or her daughter owned rentcharge to the extent of 39*l.* 11*s.* 9*d.* Prior to November 7, 1933, this tithe was under mortgage to one Edgar Armstrong Everington. By letter dated September 28, 1933, Mr. Everington's solicitors informed a Mr. Justin Brooke, who was liable for tithe amounting to 6*l.* 14*s.* 6*d.*, part of the amount of 39*l.* 11*s.* 9*d.*, that Mr. Everington had disposed of tithe to the Church Property Trust, Ld., and requested him to pay all tithes due or thereafter to become due to that Trust or to their solicitor, Mr. Buttle. On the following day, September 29, Mr. Buttle wrote to Mr. Brooke informing him that his clients, the Trust, had acquired the tithe, enclosing a letter of authority from Mr. Everington's solicitors and an account of the amount due, and requesting payment. To this Mr. Brooke replied on September 30, noting that the Trust had purchased the tithe and adding: "I welcome this, as the church is badly in need of repair. . . . . I shall be glad to hear from you that the work is to be put in hand at once." Correspondence followed between Mr. Brooke and Mr. Buttle, and ultimately, on February 27, 1934, the plaintiffs sent to the Church Property Trust, Ld., a notice to repair the chancel. To this Mr. Buttle replied stating that the Trust "are not the owners of the rectorial tithe at Wickhambrook" but that "The tithe has been acquired for Miss Yvonne Croxford for whom her mother Mrs. Croxford is trustee." That was the fact, Mr. Everington having conveyed the tithe, amounting, as before stated, to 39*l.* 11*s.* 9*d.*, to Mrs. Croxford on November 7, 1933. By a deed poll dated January 10, 1933, Mrs. Croxford executed a declaration of trust in favour of her daughter Yvonne. On March 28, 1934, notice to repair was given to each of the defendants.

The proceedings were commenced on May 12, 1934. On June 18 an order was made by the Registrar at the instance of the defendants adding the Governors of Queen Anne's Bounty and Mr. Justin Brooke as defendants. The Governors of Queen Anne's Bounty were subsequently struck out at the defendants' instance. The plaintiffs appealed against the joinder of Mr. Justin Brooke, and after hearing argument the county court ordered him to be struck out as a defendant.

The action then proceeded against the two original defendants. It was proved that prior to March 28, 1934 (the date of the notices to repair), the total amount of impropriate tithe received by and on behalf of the defendants amounted to 39*l.* 7*s.* 4½*d.* A further sum of 11*l.* 7*s.* 2*d.* was received subsequent to the notices.

On October 18, 1934, the county court judge delivered a considered judgment in favour of the defendants. After stating the facts as above set out he proceeded as follows: "Before dealing with the questions that have to be determined as between the plaintiffs and the original defendants it is desirable that I should state the reasons why I directed that Mr. Justin Brooke be dismissed from the action, as this matter has a material bearing on the issues between the plaintiffs and the original defendants. Mr. Justin Brooke's interests were watched at the hearing of the appeal by a solicitor, but the appeal was that of the plaintiffs and their counsel argued it. It appears that Mr. Brooke is the owner of land in the parish in which certain tithe rentcharge has been merged under the agreement of 1840, and it was assumed by both parties, although no evidence to that effect was adduced, that he must be regarded as being in the position of an owner of part of the impropriate tithe rentcharge arising out of lands in the parish. On this assumption it was contended on behalf of the two original defendants that in the event of a judgment being given against them they would have no right of contribution or indemnity against Mr. Brooke (a proposition which I do not accept), but that they were liable, if at all, jointly with Mr. Brooke and for that reason entitled as of right to have him joined. On behalf of the plaintiffs it was contended that the liability of the original defendants was several and not joint; that they were entitled to sue any impropriator who was in receipt of rentcharge, and that having elected to sue the original defendants only, no order could be made against them in invitum joining another defendant. It therefore became necessary to consider the nature of the liability of an owner of impropriate tithe in respect of the repair of the chancel where there are other owners. The only authority to which I was referred was a passage in Phillimore's Ecclesiastical Law, ed. 1895, vol. ii., p. 1417, which is adopted from Burn's Ecclesiastical Law, ed. 1842, vol. i., p. 352. This passage is as follows: 'Where there are more impropriators than one (as is very frequently the case) and the prosecution is to be carried on by the churchwardens to compel them to repair, it seemeth advisable for the churchwardens first to call a vestry, and there (after having made a rate for the repair of the church and other expenses necessary in the execution of their office) that the vestry do make an order for the churchwardens to prosecute the impropriators at the parish expense. In which prosecution the Court will not settle the proportion amongst the impropriators, but admonish all who are made parties to the suit to repair the chancel, under pain of excommunication. Nor will it be necessary to make every impropriator a party, but only to prove that the parties prosecuted have received tithes or other profits belonging to the rectory sufficient to repair it; and they must settle the proportion amongst themselves. For it is not a suit against them for a sum of money, but for a neglect of the duty which is incumbent on all of them. Though it may be advisable to make as many of them parties as can be come at with certainty.' This assumes that a party who is held liable to repair has a right of contribution against any other party liable. The defendants had not issued a third party notice, and did not do so during the interval between the first hearing of the action and the adjourned hearing. As I was not (and I am not now) satisfied that when the impropriate tithe is in the hands of more than one impropriator the liability is joint the defendants were not entitled as of right to have Mr. Justin Brooke joined as a defendant in accordance with the principle of *Pilley* v. *Robinson* (1) decided under Order XVI., r. 11, of the Rules of the Supreme Court to which Order XIV., r. 2, of the County Court Rules corresponds. No notice under s. 2, sub-s. 1, of the Chancel Repairs Act, 1932, had been served on him, and in the absence of such notice there could be no justification for making an order against him under the Act. Moreover *Pilley* v. *Robinson* (1) does not lay down any rule of universal application: see *Wilson Sons & Co.* v. *Balcarres Brook Steamship Co.* (2); *Robinson* v. *Geisel* (3), and even if I had considered that the defendants and Mr. Justin Brooke must be treated as being in the position of joint contractors I should have declined, in the circumstances, to make the order." The county court judge then proceeded to deal with the main questions involved in the action as follows: "The rector of a parish, whether spiritual or lay, is liable to maintain the chancel in repair: see *Whinfield* v. *Watkins* (4); *Morley* v. *Leacroft.* (5) Before the passing of the Chancel Repairs Act, 1932, the jurisdiction to enforce this liability was exclusively in the Ecclesiastical Courts. These Courts, on proof of the allegation of failure to repair, issued a monition to the parties in default in a cause of office in a criminal suit, followed if necessary by the appropriate ecclesiastical censures, but they had no jurisdiction to enforce a claim for the payment

(1) (1887) 20 Q. B. D. 155.
(2) [1893] 1 Q. B. 422.
(3) [1894] 2 Q. B. 685.
(4) (1812) 2 Phillim. 1.
(5) [1896] P. 92.

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of money: *Neville* v. *Kirby.* (1) The only means of enforcing compliance with a monition was by resort to the civil power. This procedure is set out in the Report of the Chancel Repairs Committee presented by the Lord Chancellor to Parliament in May, 1930. As a result of disobedience a party in default may be committed to prison by order of the King's Bench Division. Such an order was made following upon a monition in *Hauxton Parochial Church Council v. Stevens.* (2) Thereafter the Chancel Repairs Committee was appointed to inquire (inter alia) 'whether the remedy now provided in such cases is appropriate in modern conditions.' The Committee reported that it was not and made certain recommendations, and thereafter the Chancel Repairs Act, 1932, was passed. By s. 1 of the Act the jurisdiction of the Ecclesiastical Courts to enforce the repair of chancels is abolished. Sect. 2, sub-ss. 1 and 2, lay down the procedure to be followed to give jurisdiction to the county court to order payment of a sum required to execute the necessary repairs. By s. 2, sub-s. 3, it is enacted that if the Court finds that if the defendant would, but for the provisions of the Act, have been liable to be admonished to repair the chancel by the appropriate Ecclesiastical Court in the cause of office promoted against him in that Court on the date when the notice to repair was served, the Court shall give judgment for such sum as represents the cost of putting the chancel in proper repair. This Court, therefore, must be satisfied before giving judgment for the sum claimed, that the case is one in which a monition would have issued in an Ecclesiastical Court. For this purpose it is therefore necessary to ascertain what would have been the decision of an Ecclesiastical Court, administering a system of law other than that exercised in its ordinary jurisdiction by this Court, that is to say, the law administered in the Courts Ecclesiastical consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the Realm as altered and supplemented by statutes: *Mackonochie* v. *Lord Penzance.* (3)

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(1) [1898] P. 160.

(2) [1929] P. 240.

(3) (1881) 6 App. Cas. 424, 446.

The principles upon which those Courts acted are stated in the passage from Burn above cited. Burn cites no authorities, nor does Dr. Phillimore. But this statement of the law, adopted by so eminent a civilian as the late Dr. Phillimore, must be regarded as authority for the following propositions: First, it is not necessary to make every impropriator a party. Second, it must be proved against an impropriator who is made a party that he has received tithes or other profits belonging to the rectory sufficient to cover the cost of repair. Third, a person against whom a monition issues must settle the proportion between himself and the remaining impropriators. Fourth, while it is not essential so to do, it is advisable to make as many of the impropriators as may be come at with certainty. As regards the third proposition, this would seem to imply that an impropriator against whom a monition has issued has a right of contribution against other impropriators. I have found no authority in support of this proposition, and in view of the conclusion at which I have arrived under the second proposition it is not necessary to express an opinion. As at present advised I am prepared to hold in a proper case that this right to contribution does exist and that it is enforceable in this Court. I now come to the second proposition. It is submitted on behalf of the defendants that they have not received sufficient to satisfy the claim, and this is beyond dispute. They therefore claim that they are not liable to admonition, and would not have been admonished by an Ecclesiastical Court. The plaintiffs contend that it is sufficient to prove that the defendants have received some tithe, that on this being proved they would have been liable to have been admonished and that an impropriator would only be excused from being admonished by an Ecclesiastical Court in a case where he had received nothing whatever. This involves the proposition that the defendants in this case ought to have expended such moneys as they have received irrespective of any evidence that this sum could usefully have been expended in repairs the total cost of which is estimated and is now agreed at 123*l.* 12*s.* 6*d.* It is not an easy task which Parliament has imposed on this

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Court of determining how an Ecclesiastical Court would have dealt with the matter. My own opinion is that a monition would not have issued for the reason that the defendants have not received sufficient to defray the cost of the necessary repairs. Further I venture to assume that an Ecclesiastical Court, sitting as a Court of conscience as well as a Court of law, would have declined, in the exercise of its judicial discretion, to issue a monition against these defendants upon its being made to appear not only that they had not received sufficient to defray the expenses of repair, but that it was alleged and not denied by other parties whom the promoters in a cause of office had refrained from citing that these parties had received sums which they ought to have devoted to the same purpose. The reported decisions of the civil courts to which I have referred, such as *Walwyn* v. *Awberry* (1), throw no light on the questions I have to determine. As regards reported decisions of the Ecclesiastical Courts, it should be noted that in *Whinfield* v. *Watkins* (2), a claim against a sequestrator for non-repair of vicarage houses and other buildings, the libel alleged that the sequestrator had received more than sufficient from the profits of the living to execute the repairs. I may add that the inquiries I have made in the Registry of the diocese of Norwich, in which the parish of Wickhambrook was included until the recent constitution of the diocese of St. Edmundsbury and Ipswich, have yielded a negative result. There would appear to be no records of any litigation in the Consistory Court which throw light on the problem. It follows that the claim fails and that there must be judgment for the defendants with costs on Scale C. Before arriving at this conclusion I have not omitted to take into consideration that this leaves the defendants in possession of money which is impressed in a non-technical, if not in a technical sense, with a trust to expend it in repairing the chancel of the church, and I have considered whether the plaintiffs be not entitled to a declaratory judgment that the moneys received by the defendants as impropriators must be applied to that purpose as and when received. But in view of my conclusion that the claim as formulated must fail, I am precluded from making such an order by the decision in *Rex* v. *Cheshire County Court Judge and United Society of Boilermakers ; Ex parte Malone* (1)."

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(1) (1677) 1 Mod. 258; 2 Mod. 254.

(2) 2 Phillim. 1.

The plaintiffs appealed. The appeal was heard on March 20, 21 and 22, 1935.

On the appeal the plaintiffs asked for judgment against Mrs. Croxford alone.

F. J. Tucker K.C., *W. T. Elverston* and *W. S. Wigglesworth* for the appellants. The point in issue is important because there is no real authority upon it. It arises under the Chancel Repairs Act, 1932, which was passed as a result of the decision in *Hauxton Parochial Church Council* v. *Stevens*. (2)

The liability of rectors to repair the chancels of churches was imposed by ancient custom: *Smallbones* v. *Edney* (3); see also *Dean and Chapter of St. Asaph* v. *Overseers of Llanrhaiadr-yn-Mochnant*. (4) The practice was that on the failure of the rector, or, after the dissolution of the monasteries, the lay impropriator to repair the chancel the matter could be brought before the Consistory Court when the Ordinary admonished him to do the repairs. Originally disobedience to this monition led to execution and later could be enforced by the writ de excommunicato capiendo: see 5 Eliz., c. 23. Afterwards the pronouncement of a person to be contumacious or in contempt was substituted for excommunication and enforced by a writ de contumace capiendo: see 53 Geo. 3, 127. The liability of the lay impropriator was personal and not by charge on the profits of the tithe and quite independent of whether the profits sufficed to do the work: *Morley* v. *Leacroft* (5); *Walwyn* v. *Awberry* (6); see also *Neville* v. *Kirby*. (7) *Hauxton Parochial Church Council* v. *Stevens* (2) led to the passing of the Chancel Repairs Act, 1932, under which judgment can be given for the cost of putting the chancel in repair where the lay impropriator would but for

(1) [1921] 2 K. B. 694.
(2) [1929] P. 240.
(3) (1870) L. R. 3 P. C. 444, 450.
(4) [1897] 1 Q. B. 511.
(5) [1896] P. 92.
(6) 2 Mod. 254.
(7) [1898] P. 160.

the Act have been liable to be admonished. Judgment therefore can be given independently of whether the profits that have been received are sufficient to do the repairs. There is no justification for the view taken by the judge in the Court below, which is based on a passage in Phillimore's Ecclesiastical Law, 1842 ed.; 1895 ed., vol. ii., p. 1417, adopted from Burn's Ecclesiastical Law, vol. i., p. 352. The passage in Burn's Ecclesiastical Law did no more than recommend a course to be adopted—namely, that proceedings should be taken against an impropriator who has failed to repair the chancel where the cost of the repairs would exceed his profits. But the authorities cited show that the liability of the impropriator was always personal and not subject to any such limitation.

[They also referred to *Ball* v. *Cross* (1); *Serjeant Davies'* case (2); *Pense* v. *Proust* (3); *Griffin* v. *Dighton* (4); *Bishop of Ely* v. *Gibbons* (5); 2 Co. Inst. Part III., p. 289, paras. 8, 9; Comyn's Dig., vol. iii., p. 614; Gibson's Codex, vol. i., p. 223.]

Vaisey K.C. and *Miss H. M. Cross* for the respondent. The Court has to consider the accuracy of the passage already referred to in Burn's Ecclesiastical Law. The origin of that passage has never been discovered, but Dr. Burn was a person with prolonged experience as Chancellor of the Consistory Court and the passage was adopted in the first and second editions of Phillimore's Ecclesiastical Law by persons of very great experience and learning. Further it is to be remembered that a proceeding for a monition is a criminal proceeding and that a man when once admonished was in danger of excommunication if he failed to obey. It is inconceivable that proceedings having this grave result would be maintainable unless it was shown that the impropriator had received sufficient from the tithes to enable him to do the work. Further it is to be observed that the Chancel Repairs Act, 1932, s. 2, sub-s. 3, imposed a liability when the defendant

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(1) (1689) 1 Salk. 164.
(2) (1621) 2 Rolle Rep. 211.
(3) (1695) 1 Ld. Raym. 59.
(4) (1864) 5 B. & S. 93.
(5) (1833) 4 Hagg. Ecc. 156.

" would, but for the provisions of this Act, have been liable to be admonished to repair the chancel by the appropriate Ecclesiastical Court " ; and that, when this was so, judgment was to be given " for such sum as appears to the Court to represent the cost of putting the chancel in proper repair." The Court therefore had no discretion in such a case as was wrongly exercised by the county court judge to take into account the means of the defendants and to allow payment by instalments. The nature of a monition is explained in *Mackonochie* v. *Lord Penzance.* (1)

The Ecclesiastical Courts would never have granted an admonition where the impropriator had not received sufficient profits to enable him to pay for the repairs : see also Ayliffe's Parergon, pp. 217, 458. There was no liability to pay out of other money. Thus, Lyndwood's Provinciale, p. 250, showed that the liability for repairs in the case of a rector was not to pay out of his private money unless he had used the fruits of his living to increase his private money. It is inconceivable that an order would have been made admonishing an impropriator who owned, say, a yearly tithe of 6*d.* for not effecting expensive repairs to the chancel. The plaintiffs have therefore failed to prove their case, that any such an admonition would have been given to Mrs. Croxford by the Ecclesiastical Courts to repair the chancel. The infant in this case, Miss Croxford, could in no case have been admonished.

[ROMER L.J. Are there any authorities as to contribution amongst the tithe owners themselves ?]

Nothing beyond the statement in Burn's that they " must settle the proportion amongst themselves." In Lyndwood, p. 253, where a rector and vicar were in possession of the tithe it was stated that contribution depended on the proportions of their interest in the benefice—" secundam qualitatem." It is submitted that the same principle applies between lay impropriators.

F. J. Tucker K.C. replied.

Cur. adv. vult.

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(1) 6 App. Cas. 424, 433.

May 3. The following judgments were delivered.

LORD HANWORTH M.R. The chancel of the parish church of Wickhambrook, in the county of Suffolk, is out of repair, and it has been estimated that a sum of 123*l.* 12*s.* 6*d.* represents the reasonable cost of executing the necessary repairs.

These proceedings are taken by the Parochial Church Council of Wickhambrook under the Chancel Repairs Act, 1932, to enforce liability for the repair of the chancel on the defendants, Yvonne Croxford, and Constance Edith Marie Croxford, her mother and trustee, who are lay impropriators of a part of the tithe rentcharge issuing out of lands in the parish of Wickhambrook, which amounts in the aggregate to 120*l.* The share of this sum which belongs to Mrs. Croxford as trustee for her daughter is 39*l.* 11*s.* 9*d.* per annum, and the remainder of the tithe belongs to other persons who are not parties to these proceedings. The facts in detail relating to the case are set out in the judgment of the learned county court judge and it is unnecessary to repeat them.

By the Chancel Repairs Act, 1932, s. 1, the jurisdiction of the Ecclesiastical Courts to enforce the repair of chancels is abolished and proceedings in future to enforce this liability are provided by s. 2 of the Act. These provisions are that where a chancel is in need of repair, "the responsible authority," which is later defined in the Act to mean the parochial church council of the parish in which the chancel is situate—if, as is the case in the present proceedings, there is one—may serve on any person who appears to them to be liable to repair the chancel a notice in a prescribed form stating in general terms the grounds on which that person is alleged to be liable, the extent of the disrepair, and calling on him to put the chancel in proper repair. If the chancel has not been put into repair in the course of a month from the service of the notice to repair, the responsible authority may bring proceedings in the county court of the district in which the chancel is situate against the person on whom the notice was served, to recover the sum required to put the chancel into proper repair; and, by s. 3, sub-s. 4 (*b*), where judgment is given for the payment of a sum of money in respect of repairs not so far executed the Court may give directions in accordance with rules made therefor for the purpose of ensuring that the money is spent in executing the repairs.

The sum for which judgment is to be given is, by s. 2, sub-s. 3, to be such sum as appears to the Court to represent the cost of putting the chancel into proper repair. And the person against whom judgment for this sum is to be given is a defendant who "would, but for the provisions of this Act, have been liable to be admonished to repair the chancel by the appropriate Ecclesiastical Court in a cause of office promoted against him in that Court on the date when the notice to repair was served." It is obvious that the Legislature in this section adopted the precedent of obscurity set many years back by a statesman who, when confronted with a question as to what are the duties of an archdeacon, contented himself by explaining that he was an officer required to perform the archidiaconal functions.

The facts of the present case prove that the defendant is in possession of a right to a quota of the great tithe, not more than 39*l.* 11*s.* 9*d.* in value per annum; that Mrs. Croxford became possessed of that right in November, 1933, and executed a declaration of trust in favour of her daughter on January 10, 1934; and that the total sum received, or to be received, from this quota of the tithe during a considerable time would be insufficient to defray the liability which is charged by the notice at 123*l.* 12*s.* 6*d.* The county court judge gave judgment for the defendants on the ground that "it must be proved against an impropriator who is made a party that he has received tithes or other profits belonging to the rectory sufficient to cover the cost of repair." He expressed his own opinion "that a monition would not have issued for the reason that the defendants have not received sufficient to defray the cost of the necessary repairs." Further, he added, "I venture to assume that an Ecclesiastical Court, sitting as a Court of conscience as well as a Court of law, would have declined, in the exercise of its judicial discretion, to issue a monition against these defendants upon its being made to appear not only that they had not received sufficient to defray the expenses of repair, but that it was alleged and not denied by other parties whom the promoters in a cause of office had refrained from citing that these parties had received sums which they ought to have devoted to the same purpose." The Parochial Church Council appeal to this Court.

Lord Hanworth M.R.

It is obvious that many difficult questions fall to be determined. They may be divided as follows: (1.) Is there a liability upon a possessor of a part of the great tithe to repair the chancel? (2.) Is that liability personal, or only to the extent of the receipts from the tithe actually received by him? (3.) In either case above, would the defendants have been liable to be admonished to repair this chancel by the appropriate Ecclesiastical Court if a cause of office had been promoted against them? (4.) Is the mere question of liability arising from the ownership of tithe in whole, or in part only, to be considered, or is the county court, and this Court, to consider whether it would have been right and proper in all the circumstances of the case to issue an admonition? (5.) Can an owner of a part of the tithe against whom a liability is established recover contribution from the other owners of the remainder of the tithe?

At the outset it is necessary to construe the word "liable" as used in s. 2, sub-s. 3. It is I think used in that sub-section in a sense different from that in which it is used in s. 2, sub-s. 1. In s. 2, sub-s. 1, the words "any person, who appears to them to be liable to repair the chancel" connote a liability that imports a duty resting on that person for which he is answerable in law. In the later sub-section it intends a peril of being admonished, to which he is exposed and subject, or from which he is likely to suffer.

The learned judge based his judgment on a passage which he cited from Burn's Ecclesiastical Law, 9th ed., 1842, vol. i., p. 352, and which I need not repeat. Sir Robert Phillimore was the editor of that edition and "corrected" and added to the original work, but no authorities are cited for the propositions advanced. The same paragraph, again without any authority being attached to it, is found in Phillimore's Ecclesiastical Law, 2nd ed., 1895, vol. ii., p. 1417, though slightly amended so as to bring it into accord with the state of the law in later years. Dr. Burn's paragraph had referred to the advisability of the churchwardens summoning a vestry. Then the vestry, having made a rate for the repair of the church, were to make an order for the churchwardens to prosecute the impropriators of the tithe, at the parish expense. Suits and proceedings to enforce church rates for ecclesiastical purposes were abolished in 1868, by the Compulsory Church Rate Abolition Act (31 & 32 Vict. c. 109), hence the paragraph was altered in this particular of procedure by the editor of his father's work in 1895—Sir Walter Phillimore, afterwards a judge of the High Court, and of the Court of Appeal, and created Lord Phillimore in 1918. But the substance of the statement for the present purpose remains the same. The learned county court judge was right in attaching weight to this statement, and the propositions involved in it, laid down as it was by a succession of such eminent authorities on ecclesiastical law. But the propositions are not easily interpreted and reconciled with what would seem to be just and equitable. It is clear that the statement imports that a suit brought against the impropriators is to enforce: (*a*) a duty and not the mere recovery of a sum of money; (*b*) a duty which lies on each and all the impropriators; and (*c*) that no abatement of the suit could be asked for by those sued on the ground that other impropriators were also liable.

But the liability is affirmed to be enforceable only if " the parties prosecuted have received tithes or other profits belonging to the rectory sufficient to repair it." It is not necessary to make every impropriator a party. It would seem, therefore, that the parties sued might escape because of the insufficiency of their receipts, although the total receipts of those sued, and not sued, might be sufficient to attract liability. If a liability is enforced, the burden of it is to be divided among those who have been held liable, and nothing is said as to any contribution being made by others liable who were not sued. It seems necessary therefore to go behind the authority of these text-books and examine the question afresh in the earlier authorities.

On the first question propounded above, it seems clear that a rector of a parish, whether spiritual or lay, is liable to maintain the chancel in repair: see Coke's Inst., Pt. II., vol. ii., p. 489; Com. Dig., Esglise (G. 2., p. 606); *Whinfield* v. *Watkins* (1) and *Morley* v. *Leacroft.* (2) In *Pense* v. *Prouse* (3) Sir John Holt C.J. said that: "by the canon law the parson ought to repair the whole; but by the custom of England, the parson shall repair the chancel, and the parishioners the nave of the church." He decided the same in *Ball* v. *Cross* (4); and see also the judgment of Sir A. Cockburn C.J. to the same effect in *Griffin* v. *Dighton.* (5) But the liability to repair the chancel may remain with the parishioners, altering the usual liability of the rector thereto, in parishes where a special custom to that effect has been established: *Bishop of Ely* v. *Gibbons.* (6) If more modern authority for the proposition that a rector is liable in law to repair the chancel is required, it is to be found in the judgment of Mellish L.J. in *Smallbones* v. *Edney* (7), where he said: "Now a tithe owner is exempted from an ordinary church-rate for the repair of the body of a church because he is under a particular liability to repair the chancel. He is not less liable, but more liable, than the owners of other property in the parish to repair the Church, being under a personal liability to repair a particular part of it."

I pass, then, to the second question: Is that liability personal and general, or only to the extent of the receipts from the tithe actually received by the tithe owner? The above authorities clearly show that the liability is personal and several, not joint. But is it limited to the extent of the tithe owner's receipts from the tithe? In *Neville* v. *Kirby* (8) Lord Penzance delivered a judgment which involved the question whether a liability could be attached to a lay rector in respect of an outlay already made in the repair of a chancel which the lay rector had a duty to repair. He thus states this liability (1): "If the chancel of a parish church is in need of repair, the Ecclesiastical Court entertains a suit complaining of its defective condition, and, on proper proof as to the persons liable to repair, it issues a monition to such persons, commanding the thing to be done, which it follows up, if need be, by the usual ecclesiastical censures. But this is the limit of the Court's interference, and there is no precedent or warrant for the exercise of the coercive powers of the Court to enforce against a layman a payment of a money claim." It is noticeable that he does not introduce any limit to the liability based on the actual receipt of profits from the rectory; and this in spite of the question being definitely raised as to the jurisdiction over a person in respect of a money claim.

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(1) 2 Phillim. 1.
(2) [1896] P. 92.
(3) 1 Ld. Raym. 59.
(4) 1 Salk. 164.
(5) 5 B. & S. 93, 105, 106.
(6) 4 Hagg. Ecc. 156.
(7) L. R. 3 P. C. 444, 450.
(8) [1898] P. 160.

Turning to the chief authority on English canon law, the Provinciale of William Lyndwood, who wrote in the reign of Henry VI. in the earlier part of the fifteenth century, for he died in 1446, I find in Book III., title 27, of the edition printed at Oxford, 1679, a precept of Archbishop Winchelsea, who was Archbishop of Canterbury from 1293 till 1313, a translation of which runs as follows: "In order that the parishioners of the several churches of our province of Canterbury may henceforth be more certain about the defects that fall upon them, lest any doubt arise in times to come between the rectors and them, we will henceforth and command that they be bound to find all the things below mentioned—namely, Legend, Antiphonary, Gradual, Psalter, Tropery, Ordinal, Missal, Manual, Chalice, principal vestment with Chasuble, Dalmatic, Tunicle and with a cope in the choir with all its accessories, a frontal for the High Altar with three towels, three surplices, one rochet, a processional cross, a cross for the dead, Thurible, a lantern and little bell for carrying before the body of Christ in the visitation of the sick, a Pyx for the body of Christ, a suitable lenten veil, banners for the Rogations, bells with ropes, a bier for the dead, a vessell for holy water, a Pax, a candlestick for the Easter candle, a font with a lock, images in the church, the principal image in the chancel, the wall of the churchyard, the repair of the nave of the church inside and outside as well in images (or statues) as in glass windows, the repair of the books and of the vestments whenever it shall happen that they need repairs. But every thing else as well in the repair of the chancel as in other things not here expressed, according to divers approved customs, have to be repaired by the rectors and vicars of the places or those to whom (the liability) belongs, in all respect at their expense."

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(1) [1898] P. 167.

Then *Serjeant Davies'* case (1) affirms this liability. The whole report is as follows: "A person who has the impropriation of the Rectory ought to repair the Chancel and in addition, if he has any land in the parish, he ought to contribute to the repair of the (nave of the) church as in this case the farmer and tenants of Mr. Serjeant Davies have the impropriation and also a farm in the same parish. This was decided by the Court without question."

In Ayliffe's Parergon Juris Canonici Anglicani (1726), pp. 458, 459, the question of the remedy for failing to carry out the repair of the chancel is discussed. The duty so to do is founded in Lyndwood, and the remedy in the case of clergymen is sequestration of the amount necessary to cover the outlay on the repairs, and if a larger sum is taken "the party aggrieved may be relieved by the benefit of an appeal." The position of a lay impropriator is not defined, but again it is noticeable that the liability is not restricted to or measured by the receipts.

Gibson in his Codex Juris Ecclesiastici Anglicani 2nd ed., 1761, at pp. 198, 199, quotes this same passage from Lyndwood, and mentions the passage of Archbishop Winchelsea already referred to with the words "in omnibus reparari sumptibus eorundem." His words are: "as rectors or spiritual parsons, so also impropriators, are bound of common right to repair the chancels . . . . under the limitations expressed in the foregoing article." None of those limitations impose the limit of receipts from the tithe. The doctrine is said to be "clear and uncontested," the only difficulty being in what manner they shall be compelled to do it; whether by spiritual censures only, in like manner as the parishioners are compelled to contribute to the repairs of the church, since impropriations are now become lay-fees; or whether by sequestrations. This point, he says, was twice under consideration in the time of Charles II.—in the first the Court inclined that there could be no sequestration. He must be referring to the case of *Walwyn* v. *Awberry* argued in Trinity Term of 1677. There are two reports of the argument on the case. (1) It was an action of trespass for taking away certain loads of wheat and other agricultural produce, to which the defendants pleaded a justification that the goods were taken in sequestration of the tithes falling due to the plaintiff, who was rector, and as such bound in law to repair the chancel of the parish church then out of repair. The facts relied on were that, the chancel needing repair, and the plaintiff being liable to execute it, the Bishop of Hereford had issued a monition to the plaintiff requiring him to fulfil his duty, and as he failed to do so, the Bishop had granted a sequestration of the tithes of the rectory, and that the defendants, as churchwardens, had carried out the sequestration and had taken the goods as alleged, which taking and trespass was thus justified. To this plea the plaintiff demurred. The question argued was whether a sequestration could be ordered as against a lay impropriator. The case was ultimately decided upon a defect in the pleading, which (inter alia) had omitted to aver that the defendants did not take into their hands more than was sufficient for the reparation of the chancel. A note is appended to the report in 1 Mod. Rep. (2) that from two other reports of the same case (3) it appeared that the majority of the Court inclined to the view that, as impropriations are now lay-fees, they cannot be sequestered for the reparation of the chancel. Serjeant Barrell, who argued the demurrer on behalf of the plaintiff, admitted "that the rector of a rectory impropriate may perhaps be bound of common right to repair the chancel." He makes no reservation that the liability extended only to the amount received into the rector's hands from the tithe.

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(1) 2 Rolle Rep. 211.

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(1) 1 Mod. Rep. 261; 2 Mod. Rep. 259.

(2) At p. 261.

(3) 2 Mod. Rep. 257; 2 Vent. 35.

Atkyns J. (1) suggests the limitation that the liability of the rector was in respect of the profits which he received and that sequestration could be applied to them. This view was the result of the character which, in his opinion, still attached to tithe, for it was still subject to the same penalties—including sequestration—as before the Statute of Dissolutions. The learned judge thought that the tithe was first to be expended in the performance of divine service and that only such surplus as remained after the discharge of "the first rights" passed to the rector. With this view of tithe he held that sequestration as an ecclesiastical form of execution still obtained, and the lay rector's duty as to the chancel was limited to what he had received by way of surplus from carrying out ecclesiastical requirements. There is no trace that the other members of the Court acquiesced in this view.

Ventris (2) gives a report of the same case, although the date is stated to be 32 Charles II. and not 29 Charles II. as in the Modern Reports. He states the defects in the pleadings on which the decision was given, but adds that the Court inclined that there could be no sequestration "for being made lay-fee, the impropriation was out of their jurisdiction, and it was now only against the parson as against a layman for not repairing the church." Again, there is no trace of any condition limiting the liability of the lay rector, and the inclination of the Court's opinion cuts away the basis on which Atkyns J.'s view rests.

There is a note in Keble's Reports (3) of the same case, where the date is once more restored to 29 Charles II., which records the doubtful view of the Court as to sequestration, but records that the Spiritual Court clearly may excommunicate the impropriator for not repairing the chancel of the Church.

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(1) 2 Mod. Rep. 258. (2) 2 Vent. 35.
(3) 3 Keble 829.

There is still another report of *Walwyn* v. *Awberry* (1), and again the date of the decision is given as 1677. It states that: " the only question was, whether or no, in case the impropriator did neglect to repair the chancel, the Ordinary might sequester the profits of the rectory to repair it ? " It was agreed that sequestration was a proper remedy against spiritual persons, but not against lay rectors. It was admitted that the Ecclesiastical Court had cognizance of the matter, and that they might proceed, by way of personal censures, to excommunication against the impropriator. But then it is stated that North C.J. inclined that the Ordinary could not sequester now it was become a lay-fee ; " but the other three judges inclined contra." No decision is reported and the case ultimately turned on the pleading point. I have examined and referred to all these reports, for insistence was naturally laid on the opinion of Atkyns J. (2). There is no decision upon the point, and the contradiction as to the view of the majority of the judges as reported in 2 Modern and in Freeman's Reports, makes the case an unsatisfactory one upon which to found a limitation of the liability laid down so expressly in Lyndwood (supra).

Watson's Clergyman's Law, ed. 1747, p. 395, takes note of the divergence of the reports on the question which procedure was proper to enforce the liability of the rector to repair, but he offers no solution ; he deals (p. 394) with " chancels repaired by rectors, impropriators, or appropriators " without any limitation of that liability, and passes on to consider the Ordinary's power over the seating in chancel and church.

On the authorities, I have come to the conclusion that the liability of a lay impropriator is personal, and is not limited to the amount of his receipts from the tithe. In view of his right of contribution from other owners of a part of the tithe, which I deal with later, this view is not so harsh as it might appear at first sight to be, and it secures that the duty of repair shall be effectively carried out.

With regard to the third question propounded, it is, in my opinion, clear from the above authorities that the defendants

(1) Freem. (K. B.) 230, 231.

(2) 2 Mod. Rep. 258.

would have been liable to be admonished to repair the chancel by the appropriate Ecclesiastical Court if a cause of office had been promoted against them. The report in Freeman (1) is explicit that the whole Court were agreed on this point. Gibson's "Codex Juris Ecclesiastici Anglicani" (supra) treats the sanction by spiritual censures as undoubted, and his law is derived from Lyndwood (supra). See also Degge's Parson's Counsellor, 7th ed., 1820, p. 209. Lord Penzance's statement in *Neville* v. *Kirby* (2) above set out as to the remedies against an impropriator for failure to fulfil his duty, appears to be well founded on the authorities.

On the fourth question Mr. Vaisey reminded the Court that the jurisdiction that it is called upon to exercise is criminal, or quasi-criminal, and penal. But as Lord Selborne L.C. said in *Mackonochie* v. *Lord Penzance* (3), even in proceedings which are called (and in some sense are) criminal and penal, the ecclestiastical law has for its object, not the punishment of the individual offenders, but the correction of manners and the discipline of the Church.

In *Morley* v. *Leacroft* (4), in which the liability of a lay rector to repair the chancel of a parish church was made clear by admission, an admonition was issued in pursuance of a duty which the chancellor felt was clear, and he indicated that he had power to enforce it if it were disobeyed.

The real argument which was urged on behalf of the respondent in the present case was an appeal asking: Is it fair to impose the liability when at present so little has reached the hands of the tithe owner? More will come; and it may be hoped that the sum estimated to be required, if laid out, will render the chancel sound for a number of years. This appeal ad misericordiam does not appear to be founded on precedent. Sect. 2, sub-s. 3, of the Act of 1932 refers to the defendant who would have been liable—i.e. in peril—of being admonished on the date when the notice to repair was served on him. Those words appear to indicate the time when the liability is to be discovered, which may be before the question

(1) Freem. (K. B.) 230.

(2) [1898] P. 160, 167.

(3) 6 App. Cas. 424, 433.

(4) [1896] P. 92.

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of the appropriateness, or harshness, of an admonition could have been determined by an inquiry into the figures relevant to the case, and the portion of tithe received, or receivable, by the defendant.

Finally it appears to me that the respondent would be entitled to enforce contribution from the other tithe owners ; for they must settle amongst themselves the proportion that each is to pay. That is the statement of Dr. Burn and Sir Robert Phillimore. Order XI. of the County Courts Rules provides the method whereby contribution can be enforced by third-party procedure, and the respondent can make use of this for reimbursement of moneys paid by her beyond her proper share. Meantime all hardship against the respondent can be avoided by an order being made under s. 26 of the County Courts (Amendment) Act, 1934, for payment by instalments of the sum due.

For these reasons I am of opinion that the appeal should be allowed and an order made as asked for in the notice of appeal.

ROMER L.J. The question to be determined upon this appeal is whether the defendant Mrs. Croxford would, but for the Chancel Repairs Act, 1932, have been liable on March 28, 1934, to be admonished by the appropriate Ecclesiastical Court, in a cause of office promoted against her in that Court, to repair the chancel of Wickhambrook parish church. The facts existing on that date material to a decision of this question are as follows. The chancel was out of repair and could only be put into proper repair by an expenditure of 123*l.* 12*s.* 6*d.* Mrs. Croxford was the legal owner in fee of impropriate tithe rentcharges charged on land in that parish amounting in all to 39*l.* 11*s.* 9*d.* a year. Such rentcharges had only been conveyed to her on November 7, 1933, and she had received in respect of them no more than 39*l.* 7*s.* 4*d.*

On this state of facts it is contended on her behalf that, inasmuch as the sum received by her was less than the amount necessary to put the chancel into repair, the Ecclesiastical Court would have had no power to admonish her to do the repairs or any of them. Alternatively, it is contended that even if the Court would have had such power it would not have exercised it in the circumstances. It is contended on the other hand upon the part of the Parochial Church Council that Mrs. Croxford could have been admonished, inasmuch as she was on March 28, 1934, the owner of the tithe rentcharges, and that it is immaterial whether she had or had not at that date received any payment in respect of them. As to her alternative contention, they say that it is equally immaterial to consider whether the Court would or would not have admonished her in the circumstances, and that the only question to be determined is whether the Court had the power to do so. On this latter point I think that the Parochial Church Council are right. The Act does not impose as a condition precedent to the Court giving judgment for the responsible authority that it should find that the defendant would, but for the provisions of the Act, have been in fact admonished, but whether the defendant would, but for those provisions, have been liable to be admonished. The word "liable" shows, in my opinion, that the question to be considered by the Court is whether the defendant could, consistently with the law, have been admonished, and not the question whether the defendant would in fact have been admonished in the particular case.

The only question, therefore, to be determined upon this appeal is whether the defendant could, but for the Act, have been admonished "to repair the chancel." If so, then the Court was obliged by the Act to give judgment for the plaintiffs for the full sum of 123*l.* 12*s.* 6*d.* That this may in certain cases lead to considerable hardship is not a matter which we are entitled to take into consideration, because the words of the Act itself are unambiguous. All that we have to ascertain is the law relating to the repair of a chancel before the Act came into operation. As to this law one thing clearly emerges from the numerous authorities to which our attention has been very properly called. It is this. The parson or other the owner of the rectory, whether ecclesiastical appropriator or lay impropriator, was liable to keep the chancel of the parish church in repair. The real difficulty consists in finding out whether the duty to repair was one arising out of the possession of the rectory, irrespective of the profits received by its possessor, or whether it was merely a duty to apply the profits as and when received in effecting the repairs. On this question there does not appear to be any direct authority. Nor is this at all surprising, for down to comparatively recent times the question could not often have arisen.

In earlier times the rectory can very seldom have been divided up among numerous holders all or many of whom might be in possession of a share the profits derived from which would be wholly insufficient of themselves to keep the chancel in repair. But as a result of the numerous Inclosure Acts passed during the latter end of the eighteenth century, and the general commutation of tithes for tithe rentcharges, and the subsequent redemption of many such rentcharges for money, or their extinguishment by merger in the lands out of which they issued, the property of the rectory, or what now represents it, is often in modern times found in the hands of a numerous and not easily ascertainable class. What the Ecclesiastical Courts would have done in such circumstances must, in the absence of direct authority, be largely a matter of inference to be drawn partly from what is said in the various authorities and partly from what is left unsaid. These authorities have been reviewed by the Master of the Rolls in his judgment, which I have had the privilege of reading, and need not be referred to in detail here. They are unanimous in this, that, except in some few cases where there has grown up a custom to the contrary, the parson or rector is responsible for keeping the chancel in repair. This is to be found stated over and over again without any qualification being added, and it seems reasonable to infer from this fact that no qualification was recognized.

There is, however, a passage in the judgment of Atkyns J. in *Walwyn* v. *Awberry* (1) from which it may be inferred that in the view of that learned judge the liability of a lay impropriator of a rectory to repair is not unqualified. In

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(1) 2 Mod. Rep. 254, 258.

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that case, of which the best report is to be found in 2 Modern Reports, p. 254, a lay impropriator of a rectory had been admonished by the ecclesiastical authority for not having kept the chancel in repair, and the question arose whether such admonition could be enforced by a sequestration of the profits of the rectory. The question was not in fact decided, inasmuch as the case went off on a matter of pleading. Atkyns J., however, was of opinion, differing apparently in this respect from the view entertained by the majority of the Court, that the profits of a lay impropriator could properly be sequestrated by the Ecclesiastical Court for the purpose of enforcing its admonition. His view was that the lay rector was entitled to retain only so much of the profits of the rectory as was not required for the repairs. If this were so, then it would seem to follow that such a rector could only properly be admonished for not having applied the profits come to his hands in effecting the repairs. So that if he had only received profits that were insufficient for the purpose he would not be admonished. But the majority of the Court did not presumably take the same view of the lay rector's right to the profits that commended itself to Atkyns J. The question whether an admonition to repair could be enforced by sequestration of the profits or merely by excommunication, would not necessarily have thrown any light upon the nature of the liability to repair, even if it had been decided. The case would, however, be valuable if the view taken by Atkyns J. of the nature of a lay impropriator's interest in the rectory could be accepted. Unfortunately, as I have pointed out, he appears on this question to have been in a minority. In these circumstances the case cannot be regarded as an authority for imposing a qualification upon the liability of a rector to repair that is not mentioned by any one of the other authorities, and which in four of them, at any rate, would almost certainly have been alleged if it had existed.

These four authorities are: *Bishop of Ely* v. *Gibbons* (1); *Morley* v. *Leacroft* (2); *Neville* v. *Kirby* (3); and *Hauxton*

(1) 4 Hagg. Ecc. 156.

(2) [1896] P. 92.

(3) [1898] P. 160.

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Parochial Church Council v. *Stevens* (1). In all these cases impropriators of a rectory or part of it were admonished for non-repair of the chancel, and in no one of them was it even averred that the person admonished had received profits from the rectory sufficient to enable him to effect the repairs. It is true that in all of them it was highly probable that sufficient profits for the purpose had in fact been received. But if such a receipt was a condition precedent to the existence of the liability it is almost incredible that the fulfilment of the condition should not have been averred.

There is one further matter to which I ought to refer before passing from the reported cases. It was stated by Sir A. Cockburn C.J. in *Griffin* v. *Dighton* (2) on the authority of a passage in Lyndwood (supra) that where there are both rector and vicar in the same church, they shall, there being no custom to the contrary, contribute to the repair of the chancel in proportion to their benefice. Some reliance was placed on behalf of the respondents upon this statement. It does not, however, help them, for it throws no light upon the question of whether the rector's liability is conditional on his having received profits of the rectory. Indeed, so far as it goes, it seems to be against them. For the liability of the rector to contribute to any expenses incurred by the vicar in effecting the repairs is again stated in general terms and without reference to the amount of profits actually received by him.

The respondent's case, however, receives considerably greater support from the passages in Burn's Ecclesiastical Law and substantially repeated in Sir Robert Phillimore's book, to which the Master of the Rolls has referred. They appear to lay down the following propositions: (1.) That, where a rectory is held by several impropriators, any one or more of them may be proceeded against for non-repair of the chancel without making the others parties to the suit, if the parties proceeded against can be proved to have received between them profits belonging to the rectory sufficient to effect the repairs; (2.) that the parties so proceeded against must settle between themselves

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(1) [1929] P. 240.

(2) 5 B. & S. 93, 105.

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the proportions in which these expenses of repair are to be found. But no authority for the propositions is cited, and they seem in some respects very unsatisfactory and illogical. That one only out of several impropriators may be proceeded against for non-repair of the chancel seems reasonably clear. Neither in the case of *Bishop of Ely* v. *Gibbons* (1), nor in that of *Hauxton Parochial Church Council* v. *Stevens* (2) was the impropriator in question the owner of the whole rectory, yet no objection was taken on this score. But this throws no light upon the question whether the liability of a rector to repair the chancel is a merely personal one, or whether it is dependent upon the receipt of profits sufficient for the purpose. For in the former case each owner of a share in the rectory must owe an unqualified duty to repair. In the latter case he must owe a duty to repair if he has received sufficient profits to cover the expense of repairing. In either case he could be admonished for the neglect of his duty without citing the owners of the other shares.

But it is difficult to see why two or more impropriators can only be proceeded against for non-repair when it can be shown that they together have received sufficient profits to effect the repairs. For if the duty of each one to keep the chancel in repair be unqualified, any such proof would be unnecessary. If, on the other hand, his duty be contingent upon his having received sufficient profits for the purpose, how can one impropriator, who has received either no profits at all or profits insufficient for the purpose, be made liable to admonition merely by joining with him another impropriator who has received enough profits to enable him to discharge his duty ? For it can hardly be suggested that one of several impropriators is under any obligation to compel the others to perform their own. The fact that two or more impropriators may be admonished for non-repair of the chancel without showing that each one has received profits for the purpose necessarily tends, therefore, in my opinion, to the conclusion that the duty of each one is an unqualified one. So too, though in a lesser degree, does the fact that one of several

(1) 4 Hagg. Ecc. 156.

(2) [1929] P. 240.

impropriators who has repaired the chancel can obtain contribution towards the expenses from all the others. I say "all the others," as I cannot accept the proposition that contribution can only be obtained from those impropriators who have been joined in the proceedings—if Dr. Burn intended to lay down any such proposition, which I venture to doubt. If the liability to repair be unqualified, then all the impropriators will have to contribute, and, on the analogy of the rector and the vicar, will do so proportionately to their shares in the rectory. If, on the other hand, the liability to repair be a qualified one as is suggested, the impropriators will only contribute proportionately to the profits they individually receive and the amount of these may be very difficult to ascertain. But, apart from the difficulty of ascertaining the amount of the individual contributions, an apportionment of the expenses according to the profits received would or might be grossly inequitable. For the owner of perhaps the largest share in the rectory would escape having to contribute anything at all if he had only recently acquired his share and had not at the time received any profits from that share.

In my opinion, for these reasons and for those given by the Master of the Rolls, this appeal should be allowed.

Eve J. I have had an opportunity of reading both the judgments just delivered, and, in acquiescing therein, I hope I shall not be regarded as guilty of undue temerity, in a case involving the consideration of matters in which I have had but little experience, when I say that the result of those judgments does not appear to me to be reasonable or just, and would seem to be one to which the attention of the Legislature might properly be directed.

F. J. Tucker K.C. Mr. Vaisey has drawn my attention to the fact that in para. 8 of the note to Order L. r. 63, which appears on p. 1841 of the Annual County Courts Practice, 1935, it is stated: "In any proceedings under the Chancel Repairs Act, 1932, in which judgment is given for the payment of a sum of

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money in respect of repairs not yet executed the sum for which judgment is so given shall, unless the judge shall otherwise direct, be paid into court to the credit of an account intituled in the action, and any sum so paid into court may be invested or be paid from time to time out of court to such person as the judge may direct, and rule 25 of Order IX. shall apply with regard to such moneys." It is submitted that the proper order would be that the money be paid into the county court to abide the directions of the county court judge under this rule.

Lord Hanworth M.R. That seems right, Mr. Vaisey.

Vaisey K.C. Yes, I think so.

Appeal allowed against defendant Mrs. Croxford.
Leave to appeal to House of Lords granted.

Solicitors for appellants: *Thomas Eggar & Son, for Greene & Greene, Bury St. Edmunds.*

Solicitors for respondents: *Heald, Johnson & Co., for Steed & Steed, Long Melford.*

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KELLY (INSPECTOR OF TAXES) *v.* ROGERS.

Revenue—Income Tax—Foreign Possessions and Securities—Dividends not remitted to England—Trustee resident in England administering Foreign Trust—Assessability—Residence in Division during Year of Assessment—Removal to another Division before Date of Assessment—Jurisdiction of Commissioners of Original Division to Assess—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Miscellaneous Rules, r.* 4—*All Schedules Rules, r.* 4.

The respondent, a woman of American birth married to an Englishman and residing in England, was appointed, under the will of her mother, an American citizen, trustee for her sister, whose domicil of origin was American and who suffered under an incapacity. The trust fund in the main consisted of stocks, shares and securities in America:—

Held, by Finlay J. and the Court of Appeal, that the respondent, being in receipt and control of the income of the trust fund, as trustee, was liable to be assessed on the whole of that income and not merely on that part of it which was brought over to this country and applied for the benefit of her sister, although the income did not arise in this country or under an English trust.

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Observations of Lord Cave in *Williams* v. *Singer* [1921] 1 A. C. 65 applied.

In 1932 the respondent left the S. division in which she had resided for some years, including the year 1926–27, and went to live elsewhere. In 1933 the Commissioners of the S. division made an assessment on her in respect of the year 1926–27 :—

Held, by Finlay J. and the Court of Appeal, that the Commissioners of the S. division had jurisdiction to make the assessment.

CASE stated by Special Commissioners of Income Tax.

At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on October 16 and 30, 1933, the respondent, Mrs. Amy W. Rogers, appealed against estimated assessments to income tax for the year ending April 5, 1927, in the sum of 1600*l.* in respect of income from possessions out of the United Kingdom and in the sum of 1600*l.* in respect of income from securities out of the United Kingdom. These assessments had been made on the respondent in her capacity as trustee under the will of the late Harriette Willmer.

Harriette Willmer, an American citizen, died in New Jersey in 1910. By her will, dated December 18, 1907, she appointed the respondent trustee for her (the testatrix's) daughter, Jennie, " with full power to receive, hold, use, invest, re-invest, sell and manage all and singular the moneys, securities and property of every description given in trust for the benefit of my said daughter, Jennie, by any clause of this will."

The respondent, who was married to an Englishman, had lived in the United Kingdom since 1889, and Jennie Willmer had lived with her since 1910. Jennie Willmer was an incapacitated person within the meaning of General Rule 4, Income Tax Act, 1918. Her domicil of origin was American.

For many years the fund settled by Harriette Willmer on the trusts mentioned had consisted for the most part of stocks, shares and securities in America. The respondent at first brought over from America the sum of 400*l.* a year, which was spent each year for the maintenance of Jennie Willmer. After a time she brought over 600*l.* a year, but the balance of 200*l.* a year was not spent for the maintenance of Jennie Willmer, but was invested in the United Kingdom to form an emergency fund in view of Jennie Willmer's state of health. The balance of the income of the trust fund was accumulated in America.

Assessments had been made on the respondent as trustee for Jennie Willmer in respect of the sum of 400*l.* expended each year for her maintenance. For 1925–26 additional assessments were made on the respondent as trustee for Jennie Willmer in respect of (*a*) income from foreign possessions and (*b*) income from foreign securities. Appeals were lodged against the said additional assessments. At the hearing of the said appeals before the Special Commissioners it was not contended on behalf of the Crown that the respondent was liable as trustee for Jennie Willmer in respect of income from foreign securities, but it was contended that she was so liable in respect of the full amount of remittances from foreign possessions received in the United Kingdom. Evidence was given that, according to the law of New Jersey, Jennie Willmer's right under the will was the right to such a sum as was required for her maintenance and no more, except that, if, in any year, the income was insufficient, she was entitled to have recourse to capital but that she had no right to any specific stocks and shares but only the right against the trustees to have the trust reasonably administered. The Special Commissioners who heard the appeal held that the assessment on the respondent as trustee for Jennie Willmer could only cover income expended on the maintenance of Jennie Willmer and, as it was agreed that the full liability for the year on that had been covered by the original assessment, they discharged the additional assessment.

The assessments for 1926–27 which were the subject of the present appeal were made on the respondent as trustee under the will of Harriette Willmer on the basis that she was liable in respect of income arising from foreign securities forming part of the trust fund and in respect of remittances from foreign possessions forming part of the trust fund, subject, however, to an allowance in respect of the amount assessed on the respondent as trustee for Jennie Willmer as aforesaid.

The assessments in question were made in March, 1933, by the Commissioners for the Sevenoaks division of the county of Kent, in which division the respondent resided during the year of assessment 1926–27 and until October, 1932. While in Kent, the respondent lived with her husband in a house owned by the respondent. On October 4, 1932, the respondent left Kent permanently, and since that date she had resided only at Sidmouth in the county of Devon with her husband in a house owned by him.

It was contended by counsel for the respondent: (*a*) that Mrs. Rogers, as trustee for an incapacitated person, was liable to be assessed to income tax only to the same extent as that person would be so liable were that person not incapacitated; (*b*) that the incapacitated person in this case, namely, Jennie Willmer, was liable to be assessed to income tax only on the amounts remitted to the United Kingdom for her maintenance and support, and on these sums income tax had already been paid; (*c*) that Mrs. Rogers as trustee was not liable to be assessed to income tax on the whole of the income arising from the trust fund in America whether remitted or not, merely because she resided in the United Kingdom: *Williams* v. *Singer* (1); (*d*) that in March, 1933, the Commissioners for the division of Sevenoaks had no jurisdiction to make assessments on the respondent, for the reason that the respondent was no longer resident in their division; and that the assessments should be discharged.

On behalf of the Crown it was contended: (*a*) that the respondent as trustee under the will of Harriette Willmer was in receipt and control of the income of the trust fund not expended for the maintenance of Jennie Willmer; that she was resident in the United Kingdom and was, therefore, liable under Case IV. and Case V. in respect of the income from the trust fund, subject to an allowance in respect of the amount of the assessment made on her as trustee for Jennie Willmer; (*b*) alternatively, that the respondent was liable under Case V. in respect of the remittances from the trust fund subject to the aforesaid allowance; (*c*) that the respondent had not, by ceasing to reside in Kent, ceased to be within the jurisdiction of the Commissioners for the Sevenoaks division for the purposes of assessment for the year 1926–27.

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(1) [1921] 1 A. C. 65.

The Commissioners decided in favour of the first contention made on behalf of the Crown, but held that, in March, 1933, at which time the respondent was ordinarily residing at Sidmouth and nowhere else, the Sevenoaks Commissioners had no jurisdiction to make the assessments under appeal. They therefore discharged the assessments.

The Crown appealed.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the appellant.

Raymond Needham K.C. and *Terence Donovan* for the respondent.

FINLAY J. This case, no doubt, raises points of importance. I have arrived at the conclusion that the decision of the Special Commissioners was wrong, although I agree with their view on the main point which was discussed before me.

There are two points in the case. One is a point as to taxability. The other is purely technical, but no doubt of importance. It is whether the Commissioners who made the assessment appealed against could make that assessment.

With regard to the point whether the assessment can be supported, Mr. Needham called my attention to r. 4 of the All Schedules Rules under the Income Tax Act, 1918. That rule is as follows: "The trustee, guardian, tutor, curator, or committee of any incapacitated person having the direction, control, or management of the property or concern of any such person, whether such person resides in the United Kingdom or not, shall be assessable and chargeable to tax in like manner and to the like amount as that person would be assessed and charged if he were not an incapacitated person." The substance of Mr. Needham's argument was that that rule specified (*a*) a special and exceptional case in which trustees are to be assessed, and (*b*) the measure of their assessability, outside which there is no liability on trustees to be assessed. I do not think that that argument is right. In my opinion, it is inconsistent with the view which was taken by Lord Cave in *Williams* v. *Singer* (1), where, after dealing with two sections, he said: "And even apart from these special provisions I am not prepared to deny that there are many cases in which a trustee in receipt of trust income may be chargeable with the tax upon such income. For instance, a trustee carrying on a trade for the benefit of creditors or beneficiaries, a trustee for charitable purposes, or a trustee who is under an obligation to apply the trust income in satisfaction of charges or to accumulate it for future distribution, appears to come within this category; and other similar cases may be imagined. The fact is that if the Income Tax Acts are examined, it will be found that the person charged with the tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to secure for the State a proportion of the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found. If the beneficiary receives them he is liable to be assessed upon them. If the trustee receives and controls them, he is primarily so liable." That lays down a general principle and I see no reason at all for restricting it to English income, or to income which arises in this country, or which arises under an English trust, or anything of that sort. The same principle, I think, was laid down in the Scottish case *Reid's Trustees* v. *Commissioners of Inland Revenue.* (2)

In the present case the beneficiary, Miss Willmer, who unfortunately suffers under a disability, is not, as such, entitled to the income. All she can do is, if necessary, to go to a Court and get appropriate directions given to the trustee. But, subject to that, the income in a real sense is the income of the trustee and indeed cannot, strictly speaking, qua income be said to be the income of anybody else. That appears, as the result of the explanation given in *Baker* v.

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(1) [1921] 1 A. C. 65, 72.

(2) (1929) 14 Tax Cas. 512.

Archer-Shee (1) and *Archer-Shee* v. *Garland* (2) to be the position here. The respondent, as the trustee, married to an Englishman and residing in England, is in fact in control of the income. It is quite true that it is not her own personal income. I suppose that, in so far as it is not required for the maintenance of the lady under the disability, it would be accumulated. None the less it is, as I think, the income of the respondent as trustee for the present purpose. When one appreciates that this is income of the trustee, the matter becomes clear. Applying, as I do apply, the general principle laid down by Lord Cave in *Williams* v. *Singer* (3) I think that the respondent is liable to taxation, because as a trustee she has control of the income. On this, the main point in the case, therefore, I find myself in agreement with the Special Commissioners.

It now becomes necessary to go on and deal with the point on which I differ from the Special Commissioners. That is, as I indicated earlier, a pure technicality. I am always reluctant to give effect to a technicality, because, if there is a liability to taxation, it is unfortunate if the tax cannot be levied for some such reason as that the commissioners of one district have made the assessment, whereas the commissioners of another district ought to have made it. But the taxation authorities have got to collect tax in accordance with the directions of the Acts, and accordingly I must see whether that has been done here.

The respondent quite clearly was resident in the Sevenoaks division in the year 1926–27, the year in respect of which the assessments appealed against were made by the commissioners for that division. I do not think it matters, but, in fact, she was resident there for some years afterwards, for it was not until October, 1932, that she left Kent and went to reside in Devon. In these circumstances the question arises whether the assessment can properly be made by the commissioners for the Sevenoaks division. The matter depends mainly on the proper construction of r. 4 of the

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(1) [1927] A. C. 844.

(2) [1931] A. C. 212.

(3) [1921] 1 A. C. 65.

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Miscellaneous Rules applicable to Sch. D—mainly, but not entirely, because in argument a very large number of sections were brought to my attention. Rule 4 deals with several different classes. It deals, first, with a person engaged in a trade, profession, employment or vocation, and it says where he is to be charged. It deals, secondly, with a person who is a householder and not engaged in trade. It does not matter under which head the respondent comes, but I think she probably comes under that second head, as, apparently, she owned the house in which she and her husband were living. The third head refers to a person not engaged in trade with two or more places of residence, and then, fourthly, there is a person who is neither a householder nor engaged in trade, and he is to be assessed where he ordinarily resides. The fifth and sixth sub-rules are important. Sub-r. 5 provides: "Every other person not hereinbefore described shall be assessable and chargeable in the parish where he resides at the time of the issue of the general notices under this Act, or where he first comes to reside after the time of the issue of those general notices." Then sub-r. 6: "Every assessment and charge made in pursuance of the above provisions shall be valid and effectual, notwithstanding the subsequent removal of the person from the parish in which he is assessed or charged." Sub-r. 5 is important, not because the present case falls within it, but because it shows that a particular sort of person is assessable and chargeable in the parish where he resides at the time of the issue of the general notices under the Act. It would be a remarkable result if a person falling within that special category was assessable according to his residence at the time when the general notices under the Act were issued, while other persons, although resident in the district of assessment at that time, were not to be assessable if they happened to move. Sub-r. 6 was relied on by both sides. I think that, properly understood, it supports the argument of the Attorney-General. The wording is a little peculiar. In my view, while it certainly has reference to all the cases set forth in r. 4 the wording of the sub-rule may possibly be to some extent influenced by the sub-rule which immediately

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precedes it. The whole matter depends on the meaning of the words "the subsequent removal."

It was pointed out, and I think rightly, by the Attorney-General, and by Mr. Hills, that, if that referred to a removal after the whole process had been completed, it was entirely unnecessary. I think the meaning of the sub-rule is that the assessment and charge is to be valid and effectual notwithstanding that, after the issue of the general notices, but before the assessment is complete, the person removes. The true effect of sub-rr. 5 and 6 is to create what one may perhaps call the status of taxability by residence in the parish or place when the general notices are issued, and to provide that once a person has got that status of taxability, no subsequent removal from the district will affect it.

That really is sufficient to decide the point, but my attention was called to a good many other sections. I do not propose to go through them, but they seem to me generally to support the argument of the Crown and to show that assessment is local and nothing else. I may mention s. 125 of the Income Tax Act, 1918, which relates to additional assessments, and I myself attach considerable importance to a section to which the Attorney-General called my attention, s. 107, which relates to penalties for neglect to deliver lists. That section provides: "(1) A person who neglects or refuses to deliver, within the time limited in any general or particular notice, or wilfully makes delay in delivering a true and correct list, declaration, or statement, which he is required under this Act to deliver, shall—(*a*) if proceeded against before the general commissioners, forfeit a sum not exceeding twenty pounds and treble the tax which he ought to be charged under this Act . . . ." Sub-s. 2 provides: "The commissioners shall also proceed to assess or cause to be assessed every such person who makes default as aforesaid." In the present case I cannot doubt that the respondent, having made default, as I suppose technically she did, in preparing a full and proper declaration, might have been proceeded against before the Sevenoaks commissioners. The sub-section expressly says that "the commissioners"—which must, of course, mean those commis-

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sioners—"shall . . . . proceed to assess" her. That is the only section of the many cited to which I wish to refer. It does seem to me to afford strong support to the view which I take, that view being that once this status of taxability is created, then throughout there is a liability to be assessed by the commissioners of the place where that status has arisen, subject, of course, to the time limit imposed by the statute. The other sections which have been referred to appear to me to fit in perfectly well with that.

One argument was urged which I think I ought to notice, because it has reference to a decision of my own in *Johnstone* v. *Chamberlain* (1), where I was under some disadvantage, because the case for the appellant was argued only by the appellant in person, and I had not the advantage, therefore, of having the somewhat technical matters which arose dealt with by counsel. I do not think that what I am now deciding—that the commissioners of Sevenoaks had jurisdiction to deal with this case—conflicts in any way with what I there decided. In *Johnstone* v. *Chamberlain* (1) the person assessed had moved from one district to the other. The surveyor in the district to which he had moved discovered, or thought he had discovered, something, and a fresh assessment was made. I held, having heard the case really argued only on one side, that that assessment was in order. I should have been prepared in the special circumstances to reconsider that if I thought it needed reconsideration, but, in truth, when the decision in *Kensington Income Tax Commissioners* v. *Aramayo* (2) is examined, and when, in particular, s. 32 of the Finance (No. 2) Act, 1915—passed no doubt to deal with the situation created by that case—is considered, I am not prepared to say that my decision there was wrong, or was in any way inconsistent with the decision which I am now giving. I say no more than that in some cases, it may be, two sets of commissioners have jurisdiction. I express no final opinion about that, but what I do say, having considered the matter fully in the light of the argument, is that, in my opinion, in the present case, the Sevenoaks commissioners, within whose district the

(1) (1933) 17 Tax Cas. 706.

(2) [1916] 1 A. C. 215.

respondent resided during the whole of the year of assessment, 1926–27, had jurisdiction to make the assessments appealed against. They clearly, in the first instance, had jurisdiction to assess her to any sum they thought proper, and I cannot see anything in her subsequent removal, or in any of the subsequent facts, which in any way ousts their jurisdiction. Therefore, without going further into the question whether any other commissioners could have had jurisdiction, it is sufficient for the decision of this case to say that, in my opinion, the Sevenoaks commissioners, on the proper construction of r. 4, and indeed upon a survey of the whole Act, had jurisdiction. It, therefore, follows that the appeal will be allowed with costs.

Appeal allowed.

G. F. L. B.

The respondent appealed. The appeal was heard on July 8 and 9, 1935.

Raymond Needham K.C., *J. M. Tucker K.C.* and *Terence Donovan* for the appellant.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the Crown.

LORD HANWORTH M.R. This appeal fails. Really, if I had my own way, I should say no more than that I agree with the judgment of Finlay J.; but I do not think that would be quite courteous to the strenuous argument which we have had presented to us by Mr. Needham and by Mr. Tucker.

We have to deal with a case in which there has been an assessment made upon a person who is a trustee for the year 1926–27. At that time the trustee was resident in the county of Kent. Reading the Case, para. 9 says: "The assessments for 1926–27 which were the subject of the present appeal were made on the respondent as trustee under the will of Harriette Willmer on the basis that she was liable in respect of income arising from foreign securities forming part of the trust fund and in respect of remittances from foreign possessions forming part of the trust fund subject however to an allowance in respect of the amount assessed on the respondent as trustee for Jennie Willmer as aforesaid." As a matter of fact, the mother of the trustee, who was an American citizen, lived and died in New Jersey. She died in 1910. Her will was dated December 18, 1907, and she left three daughters, one of whom had to be taken care of—that is Jennie Willmer. It is also the fact that the present trustee, who is the sole trustee under the will, is Mrs. Rogers, and she takes care of her sister, Jennie Willmer. Jennie Willmer is interested up to a certain point under the will, her mother having made provision for her; but when she dies and provision no longer has to be made for her, then, in respect of sums which have been accumulating and have not been paid for her advantage, there is to be a trust which will come into being upon her death, but which at present it is not possible accurately to foretell or forecast. The money that has come to Mrs. Rogers as trustee is money which is derived from foreign possessions and foreign securities. It will be remembered that the taxation of foreign securities falls within Case IV. of Sch. D and that the foreign possessions fall within Case V. of Sch. D—Case V. dealing in part with securities and in part with foreign possessions. But the money that has come into the hands of the trustee is in her hands, she being resident over here and making use of some of the money for the maintenance of her sister Jennie and accumulating the rest. Under s. 112 of the Act the authorities have made what I will venture to call a token assessment upon the trustee in respect of these moneys which she has received and in respect of which she is trustee. Sect. 112 provides: "If the assessor does not receive a statement from a person liable to be charged to tax, he shall to the best of his information and judgment—(*a*) make an assessment upon that person of the amount at which he ought to be charged under Schedules A, B, and E; and (*b*) estimate the amount at which that person ought to be charged under Schedule D, and make a return to the commissioners of the name and address of that person and of any other particulars which the commissioners may require."

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As a matter of fact, the Commissioners dealing with the area of Sevenoaks, in the county of Kent, have made an assessment upon Mrs. Rogers, the present appellant, in respect of two sums estimated as being 1600*l.*, which is in respect of foreign possessions, and another and separate 1600*l.* income from foreign securities. The assessments in question were made in March of 1933 by the Commissioners for the Sevenoaks division of the county of Kent, in which division the appellant resided during the year of assessment, 1926–27, and until October of 1932. On October 4, 1932, the appellant left Kent permanently, and since that date she has resided, and still resides, only at Sidmouth, in the county of Devon. It was contended by counsel for the appellant that she was not liable to be assessed and that the Commissioners for the division of Sevenoaks had no jurisdiction to make assessments upon her for the reason that the appellant was no longer resident in that division, and that the assessments should be discharged. The Commissioners came to the conclusion that in March, 1933, at which time she was residing at Sidmouth and nowhere else, the Commissioners for Sevenoaks had no jurisdiction to make the assessments and they discharged the assessments. Finlay J. did not agree with that view and he imposed the assessments.

I will deal first with the question of jurisdiction. It is quite obvious that from time to time persons must move about, and one has to see whether any machinery has been provided by the Income Tax Acts during their long course from 1842 onwards to meet the case of persons who have moved from one area to another. It must be remembered that the duty in respect of income tax is imposed upon the taxpayer himself or herself. Under s. 98 of the Act the assessors appointed to execute the Act have to give general notices; and the person who is chargeable under the Act, whose name is included in the general notice, has to prepare and deliver to the assessors a true and correct statement of the amount of the profits or gains arising to him from each and every source chargeable according to the respective Schedules. When he has done that it is the duty of the successive authorities up to the additional Commissioners to make an assessment. Sect. 121 provides that statements of profits or gains are to be laid before the additional Commissioners; and, by sub-s. 2, "Within a reasonable time after the surveyor has examined the statements, the additional commissioners shall appoint meetings for the consideration of all such statements as are then, or from time to time, delivered to them," and by sub-s. (3) "If—(*a*) the additional commissioners are satisfied that a statement has been bonâ fide made in accordance with this Act, and so as to enable them to assess the person with the full tax which ought to be charged; and (*b*) no information is given to the additional commissioners as to the insufficiency of the statement, and the surveyor makes no objection thereto, which he is hereby authorised to make for sufficient cause, the additional commissioners shall direct an assessment to be made in accordance with the statement." That assessment goes before the general Commissioners, and when the general Commissioners have passed it it becomes effective as a charge. Sect. 122, sub-s. 3, provides: "The assessments under Schedule D, certified and delivered by the additional commissioners to the general commissioners shall be allowed and confirmed by the general commissioners after the time for hearing appeals against such assessments has expired." There are obviously other matters which must be considered: for instance, it may be necessary to make an additional assessment, because after that assessment has been made so far it may be discovered that there are facts which justify a further charge being made upon the subject. Sect. 125 provides that if the surveyor discovers (putting it shortly) that there is a further sum which has not been within the first assessment then, "where the tax is chargeable under Schedule D, the additional Commissioners shall make an assessment, on the person chargeable, in an additional first assessment, in such a sum as, according to their judgment, ought to be charged, and any such assessment shall be subject to objection by the surveyor, and to appeal." There is also a provision under which, if

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a person goes to a new place of residence, more machinery is provided. Sect. 102, sub-s. 1, says: "If any person shall come into a parish in which he has not been charged to tax, the assessor, collector, or surveyor may give him notice in writing to deliver, within fourteen days from the giving of the notice—(*a*) a declaration in writing, signed by him, specifying the parish and county in which he has been assessed; or (*b*) in default thereof, a statement in order that he may be assessed and charged in the parish into which he has come." Then there is a penalty if he refuses to deliver it. Sub-s. 3 is: "If in any case a person who is, or who resides, in any parish has not been assessed therein, the commissioners acting for the parish may assess him, as though he had been resident there at the time of the publication of the general notices directed by this Act, unless he proves to their satisfaction that he has been duly assessed in some other parish."

I think the Attorney-General is right in saying that the character of taxability attaches as soon as there has been the general notice given which imposes under s. 100 a duty upon the subject to make his return: that has to be made no doubt in the place where he resides or, it may be, in the place where he carries on business, but it is the duty of the subject to assist the authorities to collect the tax, and when a man has left and gone to another place it does not vacate all that has been done so far in the first place of residence, for I think s. 102, sub-s. 3, indicates that the original proceedings against him, with a view to his being charged to tax, stand good, and that he would be liable to tax in the new place as though he had been resident there at the time of the publication of the general notices, unless he proved to the satisfaction of the authorities that he had been duly assessed in some other parish. More than that, his convenience is met this way. If he requires the matter to be dealt with by the Commissioners who deal with the parish or place to which he has gone, then he may give a notice under s. 136, sub-s. 4, that he would like the case to be dealt with by the Commissioners where he has gone to reside, just as he has a choice under s. 148

to bring his appeal not before the general Commissioners but the Special Commissioners, if he so desires. Sect. 136, sub-s. 4 (*a*) says: "On the application of any person who has been assessed, and who has removed from the division in which the assessment was made, without having appealed in that division, the Commissioners of Inland Revenue may, if they think fit, authorise the commissioners of the division to which that person has removed to hear and determine his appeal against the assessment, and those commissioners shall proceed accordingly."

It is said against the reasoning founded on these Rules that one has overlooked the effect of the Miscellaneous Rules applicable to Schedule D. Under r. 4, provision is made as to where the person is to be assessed; either where the trade, profession or employment is carried on or where he ordinarily resides, and so on. Then when we come to sub-r. 6 of r. 4 we find this: "Every assessment and charge made in pursuance of the above provisions shall be valid and effectual, notwithstanding the subsequent removal of the person from the parish in which he is assessed or charged." As Lord Wrenbury has pointed out in *Kensington Income Tax Commissioners* v. *Aramayo* (1), these words "assessed" and "charged" are used with very different significance: sometimes the word "assessed" is used as having imposed a liability; sometimes it is only taking a step with a view to ultimate liability; and the word "charged" is also used in different places with a different significance. But it appears to me that this sub-rule clearly indicates: "Every assessment" (that is one of the initial stages) "and charge" (which is a later stage) "made in pursuance of the above provisions shall be valid and effectual, notwithstanding the subsequent removal of the person from the parish in which he is assessed or charged." Whether, therefore, the assessment has not ripened into what may be called a charge or whether there has been a charge made, but, as I still think, a charge in respect of which there could be a notice of appeal —whether or not those are the conditions, in either event the subsequent removal of the person from the place where the assessment or charge has been made does not in any way invalidate the steps that have so far been taken. It appears to me that in the present case the assessments that were made in March, 1933, and in respect of a liability which arose during the time of the residence in Sevenoaks, stand good, although the appellant left in October of 1932. During all the initial stages the Commissioners for the county of Kent had authority, and their authority is not in any way invalidated by the fact that she subsequently removed.

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(1) [1916] 1 A. C. 215, 226.

I therefore come to the conclusion that, upon what Finlay J. calls the technical question, there is no ground for accepting the view which commended itself to the Commissioners—namely, that there was no jurisdiction to make this assessment.

I now come to the substance of the matter, which needs, I think, a little more consideration. This person is a trustee, who receives certain sums over here in respect of foreign possessions and foreign securities. In respect of a certain portion of them it is possible to define the ultimate destination of them—namely, in favour of the beneficiary, Miss Willmer. Still these sums are received at the present time and are being held by the trustee for purposes which shall be ultimately determined. Rule 1 of the Miscellaneous Rules applicable to Schedule D provides: "Tax under this Schedule shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under this Schedule is hereinbefore directed to be charged." Rule 4 of the Rules applicable to All Schedules says: "The trustee, guardian, tutor, curator, or committee of any incapacitated person having the direction, control, or management of the property or concern of any such person, whether such person resides in the United Kingdom or not, shall be assessable and chargeable to tax in like manner and to the like amount as that person would be assessed and charged if he were not an incapacitated person." That clearly indicates that the person who is, prima facie, to be taxed, and taxed in respect of the beneficiary, is the trustee who is ultimately going to make the remittance or to lay

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out the money to the advantage of the beneficiary. I do not desire to say more upon this than that in *Williams* v. *Singer* (1), Lord Cave, while rejecting the argument of Mr. Cunliffe (as he then was) that when funds are vested in trustees the Revenue authorities are entitled to look to those trustees for the tax and are neither bound nor entitled to look beyond the legal ownership—while rejecting that doctrine, still said that the trustee is made chargeable with the tax, and the statutes recognize the fact that he is a trustee or agent for others, and he is taxed on behalf of and as representing his beneficiaries or principals, with the result that, to the extent to which he can indicate that a tax ought not to be paid by reason of the fact that the ultimate enjoyment is by a beneficiary, he would not be subject to tax, but can excuse himself. I think the matter is well put and summarized by Lord Clyde in his judgment in *Reid's Trustees* v. *Commissioners of Inland Revenue* (2), where he says: "The conclusion on the whole matter seems to be that trustees, albeit only the representatives of ulterior beneficial interests, are assessable generally in respect of the trust income under Rule 1 of the Miscellaneous Rules applicable to Schedule D; but that—just because they represent those beneficial interests—they may have a good answer to a particular assessment, as regards some share or part of the income assessed, on the ground that such share or part arises or accrues, beneficially to a cestui que trust in whose hands it is not liable to income tax, e.g., a foreigner under Case V., Rules 1 and 3. The fact that most trust income is subject to deduction of income tax at the source has probably obscured the specialty which attaches to the representative character of trustees as payers of income tax; but if the proposition now maintained for the trustees is a sound one it is incomprehensible that it should never have been advanced with regard to the very large sums of trust income which do not, and never can, reach the hands of an income-beneficiary." I think Lord Clyde there rightly expressed what is the result, and I desire respectfully to adopt those words as my own.

(1) [1921] 1 A. C. 65, 71.

(2) 14 Tax Cas. 512, 525.

I only add one word about the *Aramayo* case (1): I have kept that bonne bouche to the last. That case is, to my mind, of no service at all at the present time, except this, that Lord Wrenbury, with great diligence, has gone through the various steps whereby under the general course of the Income Tax Acts they are put into force and persons are made liable. He goes through the steps of the notices, the liability upon the subject, the steps to be taken by the surveyor, by the additional Commissioners, and ultimately by the general Commissioners. All that historical matter is very helpful, when one comes to the decision. The decision was this. The subject-matter in respect of which the trader was sought to be taxed was derived from foreign possessions which fell within the terms of s. 108 of the Income Tax Act of 1842, and that provided a particular method of dealing with it. It said that, "The duty to be assessed . . . . in respect of the profits or gains arising from foreign possessions or foreign securities, or in the British plantations in America, or in any other of Her Majesty's dominions, may be stated to and assessed by the respective Commissioners acting for the respective places hereinafter mentioned, videlicet, London, Bristol, Liverpool, and Glasgow, according to the regulations hereinafter mentioned." What was said was that where you condescend to the particular you cut down the general—a well known principle—with the result that s. 108 cut down the general principles which are contained in s. 106. That was a decision upon those two sections, with the result that a prohibition went to the Commissioners of Kensington, who were told that under the law as it then stood the duty ought to be exacted and paid in the City of London and was not a matter which formed part of the duty of the Kensington Commissioners to collect. That was the real decision in the case, and the prohibition went. So far as the decision goes, so far as the precision of s. 108 stood, that has all gone, for by s. 32 of the Finance (No. 2) Act, 1915, s. 108, is repealed and now the place for assessment of income tax is provided as being this: "a person may be

(1) [1916] 1 A. C. 215.

charged to income tax . . . . whether or not he is engaged in any trade, manufacture, adventure, or concern, or any employment, vocation, or office, by Commissioners acting for any parish or place in which that person ordinarily resides; and if any person has been so charged before the commencement of this Act, the charge shall not be deemed invalid by reason of that person not having been charged by the right Commissioners"—with the result that now there is the full alternative, which is contained in the Miscellaneous Rules applicable to Schedule D, under the Act of 1918, which give the alternative places where a man can be taxed and which in effect carry out the system of the Income Tax Acts to which s. 32 of the Act of 1915 had been superadded. I refer to r. 4 of the Miscellaneous Rules.

For these reasons, in addition to those which have been given by Finlay J., I think the appeal fails and must be dismissed with costs.

Romer L.J. I agree. In my opinion the material time to be observed for the purposes of r. 4 of the Miscellaneous Rules applicable to Schedule D is the time when the administrative machinery of the year of assessment is first set into operation, that is to say, the time when the general notices are issued under the Act. I am further of opinion that the word "subsequent" in sub-r. 6 of that rule means subsequent to that date. I am further of opinion that under s. 125 an additional assessment can be made and must be made in the same place. It is true that under s. 102 an alternative is apparently given to the Crown to assess in a different place where the person liable to be assessed has moved from the parish in which he was ordinarily residing at the time of the issue of the notices and has gone to a new parish. In such cases there is an option given to the Crown to have him assessed in the new parish to which he has moved. It is true that that might result in certain cases in there being a double assessment, just as through some mistake or error there might be a double assessment under Sch. D in the case of a person who is carrying on a trade or business.

It is possible that through some mistake he may be assessed in the parish where he carries on his trade and he may be assessed in the parish where he ordinarily resides, but in such cases of double assessment relief is afforded by s. 151 of the Act. I cannot agree with Mr. Tucker that any difficulty will ever be experienced in ascertaining which of the two assessments has been made by an error. To take the case of a double assessment having been made by reason of s. 102, a double assessment can only have been made by reason of the failure of the taxpayer to disclose to the authorities of the new parish to which he has moved the fact that he has already been assessed in the old parish. However that may be, in the present case there have not been two assessments; there has been one assessment made in the parish in which the appellant resided at the time when the notices were issued in respect of the year of assessment, 1926–27.

Upon the second point raised in the appeal I only wish to add this. A trustee in receipt of the income of a trust fund is the person, within the words of r. 1 of the Miscellaneous Rules applicable to Schedule D, who receives or is entitled to the income and prima facie he is the person who under that Rule has to be charged with tax on such income. But as was pointed out by Lord Cave in *Williams* v. *Singer* (1), "where a trustee or agent is made chargeable with the tax the statutes recognize the fact that he is a trustee or agent for others and he is taxed on behalf of and as representing his beneficiaries or principals." Where therefore a beneficiary can come and say: "Although the trustee is legally entitled to the income I am entitled in equity to receive that income or some definite part of it, and if I am entitled to that income or that part of it, as the case may be, at law I should not be liable to be taxed in respect of it," then of course the trustee is not chargeable because the beneficiary, on whose behalf and as representing whom the trustee is chargeable, is not himself chargeable. But where there is no such beneficiary, then the trustee remains chargeable; he is the only person who is in fact chargeable in such a case.

(1) [1921] 1 A. C. 65, 72.

Now in the present case during the year of assessment the trust on which the income was held by this lady may be described as follows: it was a trust to pay Miss Jennie Willmer 400*l.* a year, and as regards the balance of the income the trust was to hold it for a class of persons who were not then ascertainable and are not even now ascertainable. That being so, if Miss Jennie Willmer had been resident out of this country the 400*l.* would not have been liable to tax; the trustee would not have been chargeable in respect of it. Inasmuch as she is resident in this country, and as in equity she is entitled to that 400*l.*, the trustee is chargeable in respect of it. That is not disputed. As regards the balance of the income, there is no beneficiary who can say: "I am entitled in equity to the receipt of that income." That being so, the trustee remains liable and chargeable and she appears to me to be the only person who could in those circumstances be chargeable with the tax in respect of it. I ventured to suggest to Mr. Tucker in the course of his argument the case of a trustee who receives income from which there has been no deduction at the source, whose trust it is to accumulate the income for a class of beneficiaries that have not yet been ascertained or are even ascertainable. In such a case it seems clear that the trustee is the person chargeable to tax in respect of that income. If it were not so the Crown might be deprived for ever of the tax. The accumulations might go on long beyond the six years within which the Crown could make an additional assessment and the tax would be lost.

For these reasons, as well as those given by the Master of the Rolls, I agree that this appeal fails.

MAUGHAM L.J. I am of the same opinion, and, agreeing as I do with the judgment of Finlay J. and the reasons given for his decision, I only wish to make two observations. The first is with regard to the technical point. I am satisfied that on the true construction of s. 102, sub-s. 3, of the Income Tax Act, 1918, the words "if in any case a person who is, or who resides, in any parish has not been assessed therein" refer to the case of a person with regard to whom the machinery of assessment has commenced but with regard to whom the complete rendering of that person liable to pay the tax has not been completed. I accordingly agree with what the learned judge said with regard to the construction of r. 4 of the Miscellaneous Rules applicable to Schedule D, and on that view there can be no doubt that the present assessment, which was made by the Commissioners for the Sevenoaks division of the county of Kent, apart from the question of liability, is perfectly correct.

The other observation I wish to make is on the question of substance. I take the view that the learned judge was right in basing his judgment on the speeches made by Lord Cave, Lord Wrenbury and Lord Phillimore in *Williams* v. *Singer* (1), and I only wish to point out that the present case is one where there is an implied direction for accumulation of the balance of the income, after the expenditure of such sums as are required for the maintenance of Miss Jennie Willmer, for the benefit of persons as to whom it is not and cannot at present be established that they are all residing abroad. It is a case in which Miss Jennie Willmer herself has an interest in the income which is being annually accumulated. What the result might be if the accumulations were purely for the benefit of a class of persons resident abroad and for the benefit of nobody else is a matter which does not arise for decision at the present time, and with regard to which I do not wish to express an opinion.

Appeal dismissed.

Solicitors for appellant: *J. E. Walker & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

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(1) [1921] 1 A. C. 65.

W. I. C.

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